Supreme Court, U.S.
FILED
JUN 17 2004
OFFICE OF THE CLERK

No. 03-710

IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK, A WASHINGTON STATE PATROL OFFICER, JOI HANER, A WASHINGTON STATE PATROL OFFICER, AND THEIR MARITAL COMMUNITIES,

Petitioners,

V.

JEROME ANTHONY ALFORD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

CHRISTINE O. GREGOIRE
Attorney General
Robert K. Costello
Deputy Attorney General
Michael P. Lynch*
Senior Counsel
Eric A. Mentzer
Assistant Attorney General
629 Woodland Square Loop SE
P. O. Box 40126
Olympia, WA 985-4-0126
360-459-6600
Counsel for Petitioners
**Counsel of Record*

R. Stuart Phillips
Attorney for Respondent

19307 Eighth Avenue NE
Suite B
Poulsbo, WA 98370
360-598-6232

PETITION FOR WRIT OF CERTIORARI FILED NOV. 6, 2004
CERTIORARI GRANTED APRIL 19, 2004

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition For Certiorari:

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RELEVANT DOCKET ENTRIES

November 12, 1999 [1] Complaint for False Arrest, Violation of Civil Rights; Jury Demand filed in the U.S. District Court, Western District of Washington.

May 23, 2000 [24] Defendants' Answer to Complaint filed in the U.S. District Court, Western District of Washington.

June 16, 2000 [27] Amended Complaint by plaintiff; adding Christine Gregoire, Annette Sandberg, and John Does, and Jury Demand, filed in the U.S. District Court, Western District of Washington.

October 5, 2000 [35] Motion by Defendants Washington State Police, Joi and John Doe Haner and Gerald and Jane Doe Devenpeck for Summary Judgment, filed in the U.S. District Court, Western District of Washington.

October 5, 2000 [36] Memorandum by defendants Washington State Patrol, Joi and John Doe Haner and Gerald and Jane Doe Devenpeck in Support of Motion for Summary Judgment, filed in the U.S. District Court, Western District of Washington.

November 14, 2000 [39] Response/Opposition by plaintiff to defendants' motion for summary judgment, filed in the U.S. District Court, Western District of Washington.

November 30, 2000 [41] Order by Judge Robert J. Bryan GRANTING in part and denying in part defendants' motion for summary judgment; claims against Washington Sate Patrol, Christine Gregoire and Annette Sandberg are dismissed with prejudice; claims against Officers Joi Hander and Gerald Devenpeck in their official capacities are dismissed with prejudice; claims against Officers Joi Hander and Gerald Devenpeck in their individual or personal capacities on basis of qualified immunity is denied without prejudice, filed in the U.S. District Court, Western District of Washington.

December 22, 2000 [50] Trial Brief submitted by defendants, filed in the U.S. District Court, Western District of Washington.

December 22, 2000 [51] Proposed Jury Instructions by defendants, filed in the U.S. District Court, Western District of Washington.

December 22, 2000 [52] Pre-Trial Order approved by Judge Robert J. Bryan, filed in the U.S. District Court, Western District of Washington.

January 2, 2001 [55] Minutes of Day One of Jury Trial: defendants object to plaintiff's witness Dr. Gail Shuler, argument, motion to reject witness is denied; plaintiff moved Court to deny defendants arguing re probable cause or to craft a limiting instruction to jury, issue to be resolved during trial; voir dire/selection; jury sworn;

opening statements; plaintiff called Jerome A. Alford, Dr. Gail Shuler; recess, filed in the U.S. District

January 3, 2001 [57] Minutes of Day Two of Jury Trial: Jerome Alford resumes stand; plaintiff calls: K. Remley; plaintiff rests; defendants reserve motions until end of day; defendants call: J. Haner; jury excused; defendants moved for dismissal – DENIED, filed in the U.S. District Court, Western District of Washington.

January 4, 2001 [59] Proposed Supplemental Jury Instructions by defendants, filed in the U.S. District Court, Western District of Washington.

January 4, 2001 [60] Supplemental Proposed Jury Instructions by defendants, filed in the U.S. District Court, Western District of Washington.

January 4, 2001 [61] Minutes of Day Three of Jury Trial: defendants call: P. Pierson, G. Devenpeck; jury excused, discussion as to verdict forms; defendants call: M. Lindquist; defendants rest; court instructs jury; closing arguments; jury retires do deliberate, filed in the U.S. District Court, Western District of Washington.

January 5, 2001 [66] Court's Instructions to jury, filed in the U.S. District Court, Western District of Washington.

January 5, 2001 [68] Judgment by Judge Robert J. Bryan, jury finds for defendants and

against plaintiff, filed in the U.S. District Court, Western District of Washington.

January 9, 2001 [69] Motion by plaintiff for judgment as a matter of law or in the alternative for a new trial, filed in the U.S. District Court, Western District of Washington.

January 10, 2001 [70] Order by Judge Robert J. Bryan DENYING plaintiff's motion for judgment as a matter of law or in alternative for new trial, filed in the U.S. District Court, Western District of Washington.

February 7, 2001 [72] Notice of Appeal by plaintiff from District Court decision/jury verdict finding for defendants and against plaintiff, filed in the U.S. District Court, Western District of Washington.

May 17, 2001 [76] Transcript of jury trial, Volume 1: January 2, 2001, filed in the U.S. District Court, Western District of Washington.

May 17, 2001 [77] Transcript of jury trial, Volume 2: January 3, 2001, filed in the U.S. District Court, Western District of Washington.

May 17, 2001 [78] Transcript of jury trial, Volume 3: January 4, 2001, filed in the U.S. District Court, Western District of Washington.

May 18, 2001 Certificate of Record Transmitted to United States Court of Appeals, Ninth Circuit.

May 22, 2002 Clerk's Record on Appeal transmitted to Circuit, 2 volumes, 1 expando.

August 22, 2003 [79] Judgment from United State Court of Appeals, Ninth Circuit, Reversing and Remanding, filed in the U.S. District Court, Western District of Washington.

Entered
On Docket
FEB 08 2001
By Deputy /s/

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FILED
FEB 07 2001
Clerk U.S. District Court
Western District of Washington at Tacoma

JEROME ANTHONY ALFORD,

Plaintiff,

vs.

GERAL DEVENPECK, et al.,

Defendants

Case No.: C99-5586 RJB

NOTICE OF APPEAL

TO THE CLERK OF THE COURT

Notice is hereby given that Jerome Anthony Alford, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit the jury verdict entered in this action on the 5th day of January, 2001.

DATED this 5th day of February, 2001.

//s//

R. Stuart Phillips, Esq. (29701)
19307 Eighth Ave. NE, Suite B
Polsbo, WA 98370
(360) 598-6232
rsp@lawyerphillips.com

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, R. Stuart Phillips, hereby certify that I served a copy of the attached on counsel for Defendants by first class mail this 6th day of February, 2001, at the following address:

Eric A. Mentzer, Esq.
Office of the Attorney General
Torts Division
P. O. Box 40126
Olympia, WA 98504-0126

//s//
R. Stuart Phillips, Esq.

EC [FILED] LODGED
RECEIVED
DEC 22 2000
Clerk U.S. District Court
Western District of Washington at Tacoma

FILED EC [LODGED]
RECEIVED
DEC 18 2000
Clerk U.S. District Court
Western District of Washington at Tacoma

The Honorable ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD,

Plaintiff,

v.

GERALD DEVENPECK, JOI HANER,

Defendants.

NO. C99-5586 RJB

~~PROPOSED~~RJB PRETRIAL ORDER

The parties hereby submit the following proposed Pretrial Order.

I. JURISDICTION

The court's jurisdiction to hear this case alleging violation of constitutional rights derives from 28 U.S.C. §§ 1331 & 1343. The court has supplemental jurisdiction over state-law claims under 28 U.S.C. § 1367.

II. CLAIMS AND DEFENSES

The plaintiff will pursue at trial the following claims: violation of First, Fourth, and Fourteenth Amendments, violation of 28 U.S.C. § 1983, false arrest, malicious prosecution, and false imprisonment. The defendant will pursue the following affirmative defenses: qualified immunity; good faith; probable cause; negligence of third parties; and failure to mitigate.

III. ADMITTED FACTS

The following facts are admitted by the parties:

On the evening of November 22, 1997, Tony Alford, an employee at the Puget Sound Naval Shipyard, was on his way to his second job. State Patrol Trooper Joi Haner, who had noticed the disabled vehicle and had seen plaintiff's car pull in behind the disabled vehicle, turned around and pulled in behind plaintiff's car. Plaintiff left the scene. One of the individuals in the stranded car informed Trooper Haner that the automobile that had stopped to help them had "wig wag" headlights, which are a traffic infraction under Washington law.

Trooper Haner requested backup assistance, and pursued and stopped plaintiff on SR 16. Trooper Haner noted that the license plates on plaintiff's car were unreadable due to a dark-tinted license plate cover, a small amateur radio was installed and tuned to Kitsap County Sheriff's Office communications, and that plaintiff had a police scanner next to him. Plaintiff informed Trooper Haner that he was on his way to his job as a bouncer, and had handcuffs in the car, but no weapons.

Mr. Alford was carrying a tape-recorder in his car. When stopped that night, he turned it on. When

questioned about his headlights, Mr. Alford informed the Trooper that a local dealer had just installed a new alarm system that very day, and was unsure of how it operated. He also informed the trooper that a relay was not working properly and had been placed on order. Plaintiff *was ultimately cited for the wig-wag headlights and arrested for a Privacy Act violation.* Both charges were later dismissed by the district court.

Plaintiff contends as follows:

He stopped to help a disabled vehicle on the shoulder of SR 16. As Trooper Haner got out of his car, plaintiff was returning to his car; he left the scene. Plaintiff gave the stranded motorist a flashlight to use, and then continued on his way. Mr. Alford told the trooper he was on his way to his part-time job as a bouncer at Bud's in Milton. After a short conversation with Mr. Aflord, Trooper Haner retired to his vehicle. After a ten or fifteen minute wait, Gerald Devenpeck, a State Patrol Sergeant arrived on the scene. He and Haner agreed that they had a "wannabe cop" on their hands. Both Devenpeck and Haner came to the car while Devenpeck interrogated Mr. Alford about his headlights. Mr. Alford repeatedly stated that he had only had the system installed that very day, and didn't know how to work it. He even pulled out the owner's manual in an attempt to make the lights work. He also told the officers that a relay was malfunctioning and was on back order at the dealer. When Mr. Alford complained about getting an "ass chewing" for stopping to help someone out, Devenpeck relied [sic], "I haven't started to chew your ass yet."

Without requesting permission, Devenpeck ordered Mr. Alford out of his car, and got in. At that time, Devenpeck noticed that Mr. Alford had been tape-recording his interaction with Devenpeck. He immediately placed Mr. Alford under arrest for "illegal tape recording," stating that he could not record the stop without the officer's consent. By this time, nearly an hour had elapsed since the initial contact with Haner.

Mr. Alford told the officers that he had been through this before with the Kitsap County Sheriff's Office, who had once cited him for the same thing. At that time, Mr. Alford contacted the American Civil Liberties Union who furnished him with both a copy of the applicable statute and a copy of *State v. Flora[sic],* a three-year-old Washington Court of Appeals case holding that police officers on the job are not protected by the Privacy Act. When he furnished these to the KCSO, all charges were dropped, and an apology issued.

Accordingly, Mr. Alford directed Devenpeck to the pertinent section of the RCW and the case, stating that he had a copy of both in his glove box. The officers refused to listen. Instead, at 8:10 p.m., they handcuffed him and placed him in Devenpeck's patrol car. Devenpeck then transported Mr. Alford to the Pierce County Detention Facility.

At the jail, Devenpeck charged Mr. Alford with a felony violation of RCW 9.73.030, illegally recording a private conversation without consent. Devenpeck listed himself and Haner as "victims" of the crime. Mr. Alford's car was towed and impounded, and he was forced to spend the night in

jail with the general population. He was fired from his job as a bouncer due to the arrest. He has now been diagnosed with an adjustment disorder and has been receiving treatment from a psychiatrist.

Defendants now admit that they did not contact an attorney prior to arresting Mr. Alford.

Defendants contend as follows:

Trooper Haner observed Plaintiff's vehicle pull in behind a disabled vehicle on the opposite side of SR 16. Trooper Haner made a U-turn at his first opportunity and pulled in behind Plaintiff's vehicle. Plaintiff was hurriedly proceeding back to his car as Trooper Haner exited his Patrol vehicle. After learning that the individuals at the disabled car had believed Mr. Alford to be a police officer and that Plaintiff had wig-wag headlights on his vehicle, Trooper Haner departed to question Plaintiff. Trooper Haner called for assistance.

When Trooper Haner caught up to Plaintiff he activated his emergency lights and they both pulled to the side of the road. Trooper Haner noticed Trooper Haner noticed [sic] several unusual aspects about Plaintiff's car: the license plates were unreadable due to a dark tinted license plat cover, a small amateur radio was installed with microphone attached, with which Plaintiff was monitoring Kitsap County Sheriff's Office communications; Plaintiff had a portable police scanner on the seat next to him; and although Plaintiff stated he did not have a gun in the vehicle, he did state he had handcuffs. Plaintiff stated that he used to be a trooper in Texas and a Puget Sound Naval Shipyard police officer in the 1980's but was now a bouncer at a nearby tavern.

Trooper Haner further inquired of Plaintiff about the wig-wag headlights that were reported to him by the occupants of the disabled vehicle. Plaintiff responded that the lights were part of an alarm system and that he uses them for safety along with his emergency flashers every time he pulls over. However, when Trooper Haner asked Plaintiff to demonstrate how they work, Plaintiff was unable to activate the wig-wag lights using the methods he tried at that point.

Shortly after Trooper Haner stopped the Plaintiff, Sergeant Gerald Devenpeck arrived to assist Trooper Haner. Sergeant Devenpeck consulted briefly with the Trooper, then approached Plaintiff's vehicle. Sergeant Devenpeck inquired as to the operation of the wig-wag headlights and Plaintiff again explained that they were part of his vehicle alarm system. Sergeant Devenpeck asked Plaintiff to demonstrate how the lights work but Plaintiff claimed he was unable to do so.

Sergeant Devenpeck asked Plaintiff to release the hood so they could look for a flasher device but they did not find one. When Plaintiff returned to his vehicle, Sergeant Devenpeck noticed a shiny black object on the seat next to the driver's seat. Sergeant Devenpeck looked closely at the device and noticed that it was a tape recorder with the play and record button depressed and apparently operating. When he rewound the tape, Sergeant Devenpeck could hear both his voice and Plaintiff's voice had been recorded. Sergeant Devenpeck had been trained on and was aware of the Privacy Act, RCW 9.73.030, and had some experience with it. He had Trooper Haner place Plaintiff under arrest for violating that statute.

Sergeant Devenpeck then called Mark Lindquist, the on-call Deputy Prosecuting Attorney and was advised that an arrest would be appropriate. Based on the advice given him by that DPA, Sergeant Devenpeck arrested Plaintiff for a violation of RCW 9.73.030 and cited Plaintiff for the wig-wag headlights that are in violation of RCW 46.37.280. Upon inventorying Plaintiff's vehicle before impound, Sergeant Devenpeck located a silver metal switch on the bottom side of the steering column of Plaintiff's vehicle that operated the wig-wag headlights.

IV. ISSUES OF LAW

1. Did Defendants violate Plaintiff's rights under the Fourth and Fourteenth Amendments when they arrested him?

2. Did Defendants violate Plaintiff's rights under the Fourth and Fourteenth Amendments when they detained him by the roadside for an hour to investigate a traffic infraction?

3. Do the actions and statements of Defendants evidence malice or willfulness so as to justify punitive damages?

4. Did the arrest and imprisonment of Plaintiff for actions that were not a crime constitute false arrest and false imprisonment under Washington law?

5. Did Defendants reasonably believe that Plaintiff was committing a ~~felony~~ gross misdemeanor[RJB] by recording his own traffic stop?

V. EXPERT WITNESSES

a. The name(s) and addresses of the expert witness(es) to be used by each party at the trial and the issue upon which each will testify is:

(1) On behalf of plaintiff: No expert witnesses were disclosed.

(2) On behalf of defendant: No expert witnesses were disclosed.

Over objection of Defendants, Plaintiff will offer the testimony of Katherine Nelson, CPA, Doran Anderson Nelson, 19307 Eighth Avenue NE, Suite C, Poulsbo, Washington. If allowed, she will testify to economic damages valuation.

VI. OTHER WITNESSES

1. Jerome Anthony Alford, Plaintiff, Bremerton, Washington, will testify as to all events and damages.

Over objection of Defendants, Plaintiff will offer testimony from the following witnesses:

1. Dr. Gail Shuler, Group Health Cooperative Behavioral Science Clinic, Bremerton, Washington, will testify as a treating physician concerning the impact of the incident on Plaintiff's mental condition and damage to Plaintiff.

2. Jacob Alford, Bremerton, Washington, will testify as to personal observations of impact of incident on Plaintiff.

3. Kristen Remley, Bremerton, Washington, will testify as to personal observations of impact of incident on Plaintiff.

4. Mr. John Alford, Bremerton, Washington, will testify as to bailing out son from Pierce County Jail. POSSIBLE WITNESS.

5. Mrs. Helen Alford, Bremerton, Washington, will testify as to bailing out son from Pierce County Jail. POSSIBLE WITNESS.

6. Mrs. Francine Kaplan, Silverdate, Washington, will testify as to bailing out brother from Pierce County Jail.

7. Mr. Dale Davis, Port Orchard, Washington, will testify as to work relations and job performance after incident. POSSIBLE WITNESS.

8. Trooper Andrew Cozzolino, Gig Harbor, Washington, will testify as to Gerald Devepeck's abuse of power. POSSIBLE WITNESS.

(b) On behalf of defendant:

1. Gerald Devenpeck. Defendant, contact through counsel. Will testify regarding his training and duties as a Trooper Sergeant with the Washington State Patrol and regarding his arrest and investigation of Plaintiff. WILL TESTIFY.

2. Joi Haner. Defendant, contact through counsel. Will testify regarding his training and duties as a Trooper with the Washington State Patrol and regarding his arrest and investigation of Plaintiff. WILL TESTIFY.

Over objection of Plaintiff, Defendants will offer the following witnesses:

3. Mark Lindquist. Pierce County Deputy Prosecuting Attorney. Will testify as to contact with Troopers at time of Plaintiff's arrest. WILL TESTIFY.

4. Pam Pierson, Bud's in Milton, 2702 Milton Way, Milton, Washington 98354. Will testify as to Plaintiff's employment and termination therefrom. WILL TESTIFY.

5. Art Lazel, Puget Sound Naval Shipyard. Will testify as to his supervision of Plaintiff and address Plaintiff's damage claims on charges to his employment and pay rates. POSSIBLE WITNESS.

VII. EXHIBITS

(a) Admissibility stipulated.

Plaintiff's Exhibits

1. Tape Recording of traffic stop.

2. Traffic Infraction Ticket, 0711605, 11/22/97.

3. Dismissal of Traffic Infraction Ticket and Citation, Pierce County District Court.

4. Report of Investigation, Joi Haner.

5. Report of Investigation, Gerald Devenpeck.

6. Mental Health Records, Jerome Alford.*

7. Washington State Patrol Property/ Evidence Report, Case 97-0131104-01.

8. Washington State Patrol CADLOG and Text Report, Case 97-013104.

9. Authorization to Tow / Impound, 11/22/97.

*Defendants object to the admissibility and authenticity of mental health records that reference the incident that is the subject of Plaintiff's Complaint.

Defendant's Exhibits:

A-1 Plaintiff's employment records.

(b) Authenticity stipulated, admissibility disputed:

Plaintiff's Exhibits:

1. Transcript of Plaintiff's tape recording of traffic stop.

2. Personnel File, Gerald Devenpeck.

3. Plaintiff's First Set of Interrogatories and Requests for Production of Documents and Responses Thereto, 8/4/00.

4. 2000 WSP Regulation Manual (excerpts).

5. Washington State Patrol payroll & personnel records, Gerald Devenpeck, 1980-1999.

6. Field Intelligence Report, Trooper Haner, 11/22/97.

7. Declaration of Joseph Olson, 7/17/00.

8. Notice from Chief Annette Sandberg, 7/17/00.

9. Declaration of Joi Haner, 7/17/00.

10. Declaration of Gerald Devenpeck, 6/26/00.

11. Requests for Admission and Answers thereto.

12. Disciplinary File, Gerald Devenpeck.

Defendant's Exhibits:

A-2 Criminal History Records of Plaintiff Regarding Theft 3, Offense Date: 12-23-82.

(c) Authenticity and admissibility disputed:

Plaintiff's Exhibits

1. Appointment as Special Officer by Bremerton City Police Chief, 12/2/81.

2. Thrift Savings Plan Loan Application TSP-20.

3. Mental Health Report on Jerome Alford, authored by Dr. Gail Shuler, 9/13/00.

4. Sandra Baker & Associates, bill for transcription of tape recording, 11/6/00.

5. Federal Express bill, 11/24/00.

6. Transcript, Olympic College.

7. Goodwin Attorney Services, Inc. bill, 10/16/00.

8. Goodwin Attorney Services, Inc. bill, 10/11/00.

9. Transcript, University of Puget Sound, Jerome A. Alford.

10. Transcript, Central Washington University, Jerome A. Alford.

11. Department of Defense Personnel Management Service Federal Wage System and Special Production Facilitating Wage Rate Schedules for the Seattle-Everett-Tacoma, Washington Wage Area, AC-0143R, dated 12/22/99.

12. Adjudicative Guidelines for Determining Eligibility for Access to Classified Information.

13. Investigative Standards for Background Investigations for Access to Classified Information.

14. Pain Management Evaluation of Jerome Alford by Dr. Steven Savlov, 10/28/94.

15. Application for Merit Staffing, 4/1/99.

16. Certificate of Eligibility, 1972.

17. Supplemental Experience & Supervisory Appraisal, 4/1/99.

18. Results of Appraisal, 9/19/99.

19. Civilian Leave & Earnings Statement, 7/29/00.

20. Calculation of Economic Losses, Doran Anderson Nelson, CPAs.

21. State of Washington Emergency Worker Identification Card, Jerome A. Alford, issued 7/21/95.

22. State of Washington Fire Training Academy Identification Card, Jerome A. Alford, Emergency Vehicle Accident Prevention certification, 4/09/94 .

23 Federal Communications Commission Form 660, Amateur Radio License, Jerome A. Alford, 2/18/97.

24. Federal Communications Commission Form 574-L, Radio Station License, Jerome A. Alford, 2/17/95.

25. PSNS Form 5510/45, Authorization to check security badges, Jerome Alford.

26. Radio Permit, Jerome A. Alford, PSNS Security Office.

27. Certification, Basic Firewatch Instruction, J.A. Alford, 10/28/96.

28. Authorization to carry firearms, OPNAV 5512/2, Jerome A. Alford, 2/4/88.

29. Special Achievement Award.

30. PARS Awards.

31. Hazardous Materials Handling Award.

Defendant's Exhibits

ACTION BY THE COURT

(a) This case is scheduled for trial before a jury on January 2, 2001, at 0930.

(b) Trial briefs shall be submitted to the court on or before December 22, 2000.

(c) Jury instructions requested by either party shall be submitted to the court on or before December 22, 2000. Suggested questions of either party to be asked of the jury by the court on voir dire shall be submitted to the court on or before December 22, 2000.

(d) (Insert any other ruling made by the court at or before pretrial conference.)

This order has been approved by the parties as evidenced by the signatures of their counsel. This order shall control the subsequent course of the action unless modified by a subsequent order. This order shall not be amended except by order of the court pursuant to agreement of the parties or to prevent manifest injustice.

DATED this 22 day of December, 2000.

//s// Robert J. Bryan
UNITED STATES DISTRICT JUDGE

FORM APPROVED

//s//
R. STUART PHILLIPS, WSBA #29701
19307 Eighth Ave. NE, Suite B
Poulsbo, WA 98370
(360) 598-6232
Attorney for Plaintiff

//s//
ERIC A. MENTZER, WSBA#21243
Office of the Attorney General
629 Woodland Square Loop SE
Olympia, WA 98504-0126
(360) 459-6600
Attorney for Defendants

Plaintiff's Exhibit 2

0711605

IN THE [X] DISTRICT [ ] MUNICIPAL COURT OF
[X] STATE OF WASHINGTON PLAINTIFF VS. NAMED DEFENDANT
[ ]CUNTY OF GIG HARBOR
[ ] CITY/TOWN OF

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO.	STATE	EXPIRES	IDNO. (SSN IF CV)
ALFORJA486QC	WA	00	

NAME: LAST	FIRST	INITIAL
ALFORD	JEROME	A

ADDRESS: 13688 NW COHO RUN [ ] IF NEW ADDRESS [ ] PASSENGER

CITY	STATE	ZIP CODE	EMPLOYER
BREMERTON	WA	98312	

RACE	SEX	DATE OF BIRTH	HEIGHT	WEIGHT	EYES	HAIR	RESIDENTIAL PHONE NO.
W	M	11-03-52	5-08	182	BRN	BRN	( )

VIOLATION DATE ON OR ABOUT — MONTH 11 DAY 22 YEAR 97 TIME 24 HOUR 1955 [ ] INTERPRETOR

AT LOCATION E/B SR 16 M.P. 15 CITY/COUNTY OF PIERCE

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND . . .

VEHICLE LIC. NO.	STATE	EXPIRES	VEH. YR.	MAKE	MODEL	STYLE	COLOR
	WA	98	87	CAD	FLTWD	L/DR	RED

TRAILER #2 LICENSE NO	STATE	EXPIRES	TR. YR.	TRAILER #3 LICENSE NO	STATE	EXPIRES	TR

OWNER/COMPANY IF OTHER THAN DRIVER SAME — ADDRESS — CITY — STATE — ZIP CODE

ACCIDENT [NO] NR R I F	COMMERCIAL VEHICLE [ ] YES [ ] NO	HAZARD PLACARD [ ] YES [ ] NO	EXEMPT [ ] FARM [ ] FIRE VEHICLE [ ] R.V. [ ] OTHER

DID THEN AND THER COMMIT EACH OF THE FOLLOWING INFRACTIONS

VIOLATION/STATUTE CODE	VEHICLE SPEED	IN A ZONE	[ ] SMD [ ] PACE [ ] AIRCRAFT
RCW 46.37.280			

UNLAWFUL FLASHING HEADLIGHTS
WIG WAGS

2. VIOLATION/STATUTE CODE	
3. VIOLATION/STATUTE CODE	

		PENALTY
		U.S. FUNDS $ 66.00
	RELATED NO.	DATED ISSUED 11/22/97

WITHOUT ADMITTING HAVING COMMITTED EACH OF THE ABOVE OFFESNE(S). I PROMISE TO RESOND AS DIRECTED ON THIS NOTICE	I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I HAVE ISSUED THIS ON THE DATE AND AT THE LOCATION ABOVE. THAT I HAVE PROBABLE CAUSE TO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE OFFENSE(S). AND MY REPORT WIRTTEN ON THE BACK OF THIS DOCUMENT IS TRUE AND CORRECT.
X //S// JEROME A. ALFORD DEFENDANT'S SIGNATURE	OFFICER //S// J. HANER 1111 OFFICER PIERCE CO. 11/22/97

YOU MUST RESPOND TO THE COURT BELOW ACCORDING TO THE INSTRUCTIONS ON THE REVESE SIDE OF THIS NOTICE

PIERCE COUNTY DIST CT #2
6659 KIMBALL DR NW #503-E
GIG HARBOR, WA 98335

WASINGTON UINFORM COURT DOCKET - DEFENDANT COPY

BACK SIDE OF TICKET IS UNREADABLE
EXCEPT FOR SIGNATURE BLOCK

NAME JEROME A. ALFORD

STREET 1728 Gregory Way

CITY Bremerton STATE WA ZIP 98337

X /S/ JEROME A. ALFORD

Plaintiff's Exhibit 3

COURT ORDER / TIME PAY AGREEMENT

NAME_____ CASE NO. _____

_____ DOV _____

ADDRESS

_____

JUDGMENT	AMOUNT DUE	
CHARGE #1:	C NC (D)	$_____
CHARGE #1:	C NC D	$_____
CHARGE #1:	C NC D	$_____

D I S M I S S E D

_____ DISMISS UPON PAYMENT

_____ PAY FULL AMOUNT TODAY

_____ RESET FOR_____

_____ _____

_____

I promise to pay $_____ imposed in this action on or before _____. If this sum is not paid, I shall appear and request an extension, community service/restitution or show cause why payment cannot be made. I understand that if I fail to pay on the date specified, the above amount will be due immediately and a penalty of $47 will be added. The Court will notify the Department of Licensing of my failure to pay.

In the event the Court dismissed this ticket upon payment of costs and I fail to pay as required, the Court will reverse the dismissal and notify the Department of Licensing which will place this ticket on my driving record.

I understand that my failure to respond, appear for any hearing, or pay a monetary assessment will result in the suspension of my driver's license or privilege to drive until I have paid all penalties required by law.

I further understand that the Court will refer this unpaid account to a collection agency and I may be responsible for collection fees, reasonable attorney fees and costs.

//s// Jerome A. Alford 3-4-98

Defendant Date

//s// TAF/KJG

Judge / Clerk

Pierce County District Court No. Two
6659 Kimball Drive N.W., Suite E-503
Gig Harbor, Washington 98335

Tape recorder and tape to be returned to defendant or atty Tyner. [handwritten]

D. Nelson

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ORDER

DEFENDANT Alford, Jerom [sic]				AKA			
ADDRESS Notify the Court of any change in address				BIRTHDATE		IN CUSTODY [ ]	
Case No.	**Charge/Section/ BAC**	**Amended to**	**Dispo**	**Jail Time**	**Jail Susp**	**Credit Time Srvd**	**S**
1.970711005	unlawful use						
2.970002012	intercept/record private		DISMISSED				
3.							
4.	—						

Instead of being required to spend your entire sentence in jail, you have been placed on probation. You must obey all laws of this state. You must also follow every condition marked on this order, including any additional conditions set by your probation officer. If you do not comply the court may issue a warrant for your arrest, impose additional jail time and/or costs; in traffic cases, your license will be suspended

___ PAY RESTITUTION: $_____ MONEY ORDER PAYABLE TO THE VICTIM, sent to the court by ___ for forwarding to victim___ **YOU MUST PAY** FINE/COST/BF/PROBATIONS FEES OF $_____ BY _____.

___ DO ___ HOURS OF COMMUNITY SERVICE _____ (REQUIRES $9 FEE/INSTRUCTIONS AT COUNTER)

___ BAIL FIXED AT $____ CASH/BOND; __ RELEASE IMMEDIATELY; __ PR'D; __ PR'D TO PRETRIAL SERVICES

___ BAIL BOND; __ EXPONERATED; __ REINSATED; x CASH BAIL REFUNDED TO POSTER; __ RETAIN $____ AS FINE/COSTS

___ **REPORT TO JAIL ON ____ AT _____ AM/PM**

___ DO ____ DAYS OF HOME DETENTION. SIGN UP BY: ____/COMPELTE BY: _____. (INSTRUCTION SHEET GIVEN)

___ DO ____ DAYS OF WORK CREW SIGN UP BY: ____ /COMPLETE BY:_____.(INSTRUCTION SHEET GIVEN)

___ DO _____ DAYS AT THE DWI ALTERNATIVE FACILITY AND FILE PROOF BY ___. (INSTRUCTION SHEET GIVEN)

___ YOUR LICENSE IS SUSPENDEDIMMEDIATELY. YOU MUST GET INSTRUCTIONS FROM DEPT. OF LICENSING ON THE LENGTH OF SUSPENSION AND REINSTATEMENT OF YOUR PRIVILEGE TO DRIVE.

LICENSE SURRENDERED: __ YES __ NO

___ IF A VAILD LICENSE IS SHOWN BY _____, THE FINE WILL BE REDUCED TO $_____

___ THIS CASE IS CONTINUED UNTIL _____, UPON COMPLIANCE WITH THIS ORDER, THE CHARGE WILL BE: __ DISMISSED __ AMENDED TO _____

___ DO NOT DRIVE WITH A BREATH/BLOOD READING OF .08 OR ABOVE WITHIN TWO HOURS OF DRIVING.

___ DO NOT REFUSE TO SUBMIT TO A TEST OF YOUR BREATH/BLOOD TO DETERMINE ALCOHOL CONCENTRATION UPON THE LAWFUL REQUEST OF A LAW ENFORCEMENT OFFICER.

___ YOU ARE ORDERED TO HAVE NO (HOSTILE) CONTACT WITH _____ YOU MUST COMPLETE THE FOLLOWING AND FILE WRITTEN PROOF BY _____

___ HAVE AN ALCOHOL/DRUG ASSESSMENT AND COMPLY WITH ANY RECOMMENDED FOLLOW-UP TREATMENT IMMEDIATELY. AS A MINIMUM, YOU MUST COMPLETE AN ALCOHOL/DRUG INFORMATION SCHOOL.

___ ATTEND VICTIMS IMPACT PANEL.

___ ATTEND _____AA MEETINGS PER WEEK.

___ ATTEND DEFENSIVE DRIVING SCHOOL ___ TRACK I; ___ TRACK ii

___ HAVE A DOMESTIC VIOLENCE EVALUATION AND COMPLY WITH ANY RECOMMENDED FOLLOW-UP TREATEMENT IMMEDIATELY

___ ***YOU ARE ORDERED TO APPER FOR AN APPOINTMENT WITH YOUR PROBATION OFFICER ON _____ AT _____ AM/PM.*** YOU WILL BE UNDER DIRECT SUPERVISION OF YOUR PROBATION OFFICER TO COMPLY WITH ALL ORDERS OF THE COURT AS INDICATED ABOVE AND **ANY COUNSELING AS DEEMED APPROPRIATE.** REPORTING WILL BE DIRECTLY TO YOUR PROBATION OFFICER. FAILURE TO REPORT TO PROBATION OR COMPLY WITH PROBATION CONDITIONS IS A VIOLATION OF THIS COURT ORDER.

_____

_____

YOU MUST RETURN TO COURT ON 2/18/98 AT 1:30 (AM)/PM FOR _____

I HAVE RECEIVED A COPY OF THIS FORM DONE IN OPEN COURT 2/11/98

/S/ Jerome A. Alford /s/ Pro tem R.

Plaintiff's Exhibit 4

Washington State Patrol
REPORT OF INVESTIGATION

Initial Report

Type of Investigation Illegal Audio Recording			**Case/Evidence Number**	
Date of Incident 11-22-97	**Time of Incident** 19:20	**Date Reported** 11-22-97	**Time Reported**	**Location of Indicent** Eastbound SR-16 MP 15
Charges Unlawful Audio Recording				

SUSPECTS

Suspect No. 1 (Last, First M) Alford, Jerome Anthony (Tony)								**Suspect No. 2 (Last, First M)**						
Street Address 13688 NW Coho Run			**Home Phone**					**Street Address**			**Home Phone**			
City, State, Zip Code Bremerton, Wa. 98312			**Work Phone**					**City, State, Zip Code**			**Work Phone**			
Diver's License # ALFORJA486QC		**State** WA	**Social Security Number** 538-44-1611					**Driver's License #**		**State**	**Social Security Number**			
Race W	**Sex** M	**DOB** 11-03-52	**Height** 6-8	**Weight** 182	**Eyes** BRO	**Hair** BRO	**Compl**	**Race**	**Sex**	**DOB**	**Height**	**Weight**	**Eyes**	**Hair**	**Compl**
Clothing Blue Jeans, Blue T-shirt, Leather Jacket								**Clothing**							
Scars Marks Tattoos			**Date Booked** 11-22-97	**Location Booked** Pierce Co. Jail				**Scars Marks Tattoos**			**Date Booked**	**Location Booked**		
Employer/Occup Buds Tavern, Puget Sound Naval Shipyard								**Employer/Occup**						

VICTIMS

Victim No. 1 (Last, First M) Joi Haner								**Victim No. 2 (Last, First M)** Gerry Devenpeck						
Street Address 5524 Soundview Dr.			**Home Phone**					**Street Address** 5524 Soundview Drive			**Home Phone**			
City, State, Zip Code Gig Harbor, Wa. 98335			**Work Phone** (253)858-8800					**City, State, Zip Code** Gig Harbor, Wa. 98335			**Work Phone** (253)858-8800			
Diver's License #		**State**	**Sex** M	**DOB**				**Driver's License #**		**State**	**Sex** M	**DOB**		
Employer/Occup Trooper Washington State Patrol								**Employer/Occup** Sergeant Washington State Patrol						

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WITNESSES

Witness No. 1 (Last, First M)								**Witness No. 2 (Last, First M)**						
Street Address			**Home Phone**					**Street Address**			**Home Phone**			
City, State, Zip Code			**Work Phone**					**City, State, Zip Code**			**Work Phone**			
Diver's License #		**State**	**Sex**	**DOB**				**Driver's License #**		**State**	**Sex**	**DOB**		
Employer/Occup								**Employer/Occup**						

I certify (declare) under penalty of perjury under the laws of the state of Washington that the attached reports are true, correct, and accurate (RCW 9A.72.085)

Officer's Signature/Bad Number Trooper J. Haner, #1111	**Dist** 01	**Det** 14	**Date Signed** 11-23-97	**Place Signed** Pierce County

Supervisor	**Date**

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Washington State Patrol
Report of Investigation
Alford, Jerome A
Page 2

On Saturday, November 22, 1997 while traveling westbound on SR-16 I observed a disabled vehicle eastbound SR-16 approximately milepost 17.5. As I was passing the vehicle I observed another vehicle pulling in behind the disabled. I turned around in the median at 154th St and proceeded to the disabled. I pulled in behind the vehicle which I saw pull over. It was a maroon Cadillac. As I exited my vehicle I noticed an individual walking back towards me. As he approached he stated that they had a flat tire and needed a flashlight. This individual then immediately got in the Cadillac and left. I contacted the two individuals who were changing a flat tire and one of them had a yellow plastic flashlight. The person holding the flashlight stated, "I take it the other guy is not a cop?" I asked him why he thought he was a cop and he stated that when he pulled up he had wig wag headlights. I confirmed with him that it was the Cadillac that just left and he stated that was right. I then left and tried to catch up to the Cadillac.

At 1920 I advised communications that I was stopping the vehicle and to have Sergeant Devenpeck contact me. The vehicle's rear license place was unreadable do to a dark tinted license plate cover. I contacted the driver and asked him why he left his flashlight with the disabled and he stated that he

has several of them. I asked him about the wig wag headlights that he had and he stated that it was his alarm that he could put it on mute and the headlights will flash two and two. He stated that they were not wig wags. He stated that he uses them along with this four way flashers every time he pulls over for safety. I asked him to show me how they work and he tried several times and could not get them to work. I informed him that he could not have flashing headlights he could only use his emergency flashers. I asked him for his driver's license and identified the driver as Mr. Jerome Alford. While I was speaking with Mr. Alford I noticed that he had a amateur radio installed in his vehicle and was monitoring the Kitsap County Sheriff's Office frequency. There was a microphone attached to the radio. I also noticed a portable scanner on the seat next to Mr. Alford. Mr. Alford did stated that he use to be a Trooper in Texas and a Puget Sound Naval Shipyard Police Officer in the '80's. He was now a bouncer at Bud's Tavern in Milton. I asked him if he had a gun in the vehicle and he stated that he did not he only had handcuffs.

Sergeant Devenpeck then contacted me and I informed him of what I observed and was told. I told Sergeant Devenpeck that I believed Mr. Alford was a "want to be cop". Sergeant Devenpeck then contacted Mr. Alford and talked to him about his wig wag headlights. Mr. Alford could not get his wig wags to work for Sergeant Devenpeck either. After several minutes of discussing the headlights and looking under the hood of the vehicle Sergeant

Devenpeck advised me to remove Mr. Alford from the vehicle for he was tape recording us. I removed Mr. Alford from the vehicle and Sergeant Devenpeck retrieved the tape recorder and advised Mr. Alford he was under arrest for making an illegal tape recording. Mr. Alford was placed into custody approximately 2010.

I advised Mr. Alford of his Constitutional Rights and he stated that he understood them. Mr. [end of page]

[new page]

Washington State Patrol
Report of Investigation
Alford, Jerome A
Page 3

Alford stated that he did the same thing to Pat Jones (Kitsap County Sheriff) and they dropped all the charges and apologized to him. He said that case law State of Washington v. Flores says that tape recordings on public highways does not fall under the privacy act and he checked with the ACLU and we were wrong.

I took Polaroid pictures of the location of the wig wag switch and tape recorder.

The tape and tape recorder were taken as evidence. I listened to the tape which had my entire contact with

Mr. Alford on it as well as the conversation with Sergeant Devenpeck. I had no idea that there was a tape recorder in Mr. Alford's vehicle or that I was being recorded until Sergeant Devenpeck observed the recorder.

Mr. Alford was booked into the Pierce County Jail for making an illegal audio recording without knowledge or consent and was issued a notice of infraction for having the wig wag headlights on his vehicle.

Plaintiff's Exhibit 5

Washington State Patrol
REPORT OF INVESTIGATION

Initial Report

Type of Investigation 9.73.030 Recording Conversation			Case/Evidence Number	
Date of Incident 11-22-97	Time of Incident 19:20	Date Reported 11-23-97	Time Reported 14:55	Location of Incident SR 16 at Burnham Dr.
Charges 9.73.030(3) Intercepting, recording or divulging private communication—Consent required—Exceptions				

SUSPECTS

Suspect No. 1 (Last, First M) Alford, Jerome A				Suspect No. 2 (Last, First M)			
Street Address 13688 NW Coho Run		Home Phone		Street Address		Home Phone	
City, State, Zip Code Bremerton, Wa. 98312		Work Phone		City, State, Zip Code		Work Phone	
Diver's License # ALFORJA486QC	State WA	Social Security Number 538-44-1611		Driver's License #	State	Social Security Number	
Race / Sex / DOB / Height / Weight / Eyes / Hair / Compl W / M / 11-03-52 / 5'8" / 182 / BRO / BRO / RUD				Race / Sex / DOB / Height / Weight / Eyes / Hair / Compl			
Clothing				Clothing			
Scars Marks Tattoos	Date Booked 11-22-97	Location Booked Pierce County		Scars Marks Tattoos	Date Booked	Location Booked	
Employer/Occup PSNS				Employer/Occup			

VICTIMS

Victim No. 1 (Last, First M) Haner, Joi J.				Victim No. 2 (Last, First M) Devenpeck, Gerald L.			
Street Address 5524 Soundview Dr.		Home Phone		Street Address 5524 Soundview Dr.		Home Phone	
City, State, Zip Code Gig Harbor, Wa. 98335		Work Phone 253-858-8800		City, State, Zip Code Gig Harbor, Wa. 98335		Work Phone 253-858-8800	
Diver's License #	State / Sex / DOB			Driver's License #	State / Sex / DOB		
Employer/Occup Washington State Patrol				Employer/Occup Washington State Patrol			

WITNESSES

Witness No. 1 (Last, First M)				Witness No. 2 (Last, First M)			
Street Address		Home Phone		Street Address		Home Phone	
City, State, Zip Code		Work Phone		City, State, Zip Code		Work Phone	
Diver's License #	State / Sex / DOB			Driver's License #	State / Sex / DOB		
Employer/Occup				Employer/Occup			

I certify (declare) under penalty of perjury under the laws of the state of Washington that the attached reports are true, correct, and accurate (RCW 9A.72.085)

Officer's Signature/Bad Number G.L. Devenpeck 164 //s//	Dist 01	Det 14	Date Signed 11-23-97	Place Signed Pierce County
Supervisor			Date	

REPORT OF INVESTIGATION

On November 22, 1997, at 7:20pm, Trooper Joi Haner requested contact while he was stopping a vehicle eastbound on SR 16 near Burnham Dr.

I arrived at the scene at 7:32pm, and Trooper Haner told me that he had contacted a disabled vehicle and another vehicle has been behind the disabled and the driver of that vehicle left as soon as Trooper Haner arrived. Haner told me that the occupants of the disabled vehicle told him the vehicle that had stopped had turned on wig-wag flashing headlights. The occupants of the disabled vehicle questioned Haner about the subject that had stopped being a police officer.

After receiving the information about the wig-wag headlights and insuring the disabled would be able to make repairs, Haner pursued and stopped Washington license N7ERW, a 1987 maroon Cadillac.

Haner contacted the driver, Jerome A. Alford, 11-03-52, and asked him about the wig-wag violation.

After I arrived Haner told me that the subject had left the disabled in such a hurry that he left his flashlight. He also said that Alford had multiple scanners or radios in his vehicle and while he was

talking to the subject he could hear policy calls. Haner said the subject could not get the wig-wags working. Haner said he felt the subject was a "wanta-be cop."

I checked the RCW on wig-wag headlights and confirmed that RCW 46.37.280 subsection 3 prohibited flashing lights. I then contacted Alford and advised him of the violation and asked him to display the operation of the lights. Alford said the lights were part of his alarm system that he just had installed and he wasn't familiar with the exact operation. Alford then handed me an RCW book and said he had checked in the book and they were legal. I turned to the correct RCW and pointed it out to him. Alford asked me not to let the book get wet as it was expensive.

While I had been talking to him he had pointed to an alarm box in the back seat. I asked him to show me in the instruction manual where it said that the headlights flash in an alternating fashion. He removed the box from the back seat and took out the directions. He was unable to show me in the directions anything about alternating flashing of the headlights.

I asked him to open the hood of the vehicle and step out so I could look for a flasher unit that powered the

wig-wags. He did so and I was not able to locate a flasher unit. After Alford got back in his vehicle he moved the alarm box to the passenger side of the front seat and disturbed a red jacket that had been on the seat. While I was standing outside of the vehicle I saw something shiny black exposed where the jacket had been moved. Based on the subjects behavior I was concerned that it was a weapon, so I looked very closely and could see that it was a tape recorder and the play and record buttons were pushed down. I requested Haner remove Alford from the drivers side of the vehicle, which he did.

I removed the tape recorder from the vehicle and confirmed that it was operating. I rewound the tape a short distance and could hear my voice and Alfords voice on the tape. At no time during my conversation with Alford did he announce his intentions to record my conversation or did he ask my permission to be recorded. The concealment of the recording device is an indication of his intent to clandestinely record the conversation in violation of RCW 9.73.030.

After Haner had removed him from the vehicle at approximately 8:10pm, I placed him under arrest for making an illegal tape recording. Alford said something to the effect that it was not illegal because of State of Washington -v- Florez. He went on to say that it was not in violation of 9.73.030. I advised him that it was a violation of subsection 3 and that he

had not made an announcement or obtained my permission.

While I was inventorying his vehicle for impound, I located a switch under the steering column that appeared to me to be a wig-wag activation switch. I turned the switch on and the high beams of the headlights started flashing in an alternating manner.

Alford was transported to Pierce County jail by Haner and booked for violation of RCW 9.73.030 and issued a notice of infraction for unlawful flashing headlights.

Plaintiff's Exhibit 7

WASHINGTON STATE PATROL PROPERTY / EVIDENCE REPORT PAGE__ OF __

[ ] EVIDENCE [ ] SAFEKEEPING [ ] FOUND [ ] ASSET SEIZURE

OBTAINED BY(LAST, FIRST, MI)	BADGE#	DIST / DET / UNIT	CASE / PROPERTY NUMBER
HANER JOI J	1111	1-14	97-0131104-01
[x] DEFENDANT [ ] OWNER [ ] FINDER		LOCATION OBTAINED (ADDRESS,STREET, HWY, MP0 E/B SR 16 MP 15	

NAME	DOB			
ALFORD, JEROME A.	11-3-52	[ ] WACIC / NCIC CHECKED	DATE OBTAINED	11-22-97
STREET ADDRESS 13688 NW COHO RUN	HOME PHONE -	[ ] ENTERED INTO COMPUTER	TIME OBTAINED	2000
			DEPOSITED	11-23-97
		[ ] VIN NUMBER CHECKED	TIME DEPOSITED	0200
		[ ] FOUND PROPRERY MSG SENT		

CITY, STATE, ZIP CODE	WORK PHONE	CITATION #	COURT	
BREMERTON WA 98312	-		DIST#2	

AFFIX ATTACHMENTS HERE

[ ] ADDITIONAL DEFENDANT [ ] OWNER		[ ] ADDITIONAL DEFENDANT [ ] OWNER	
NAME	DOB	NAME	DOB
STREET ADDRESS		STREET ADDRESS	

CITY, STATE, ZIP CODE			CITY, STATE, ZIP CODE		
HOME PHONE	WORK PHONE	CITATION 3	HOME PHONE	WORK PHONE	CITATION #

ITEM #	QTY	PROPERPY DESCRIPTION LIST MANUFACTURERS NAME, CALIBER, ARTICLE TYPE, MODEL #, SERIAL #, OWNER APPLIED #, IF APPLICABLE	ITEM WEIGHT	PACKAGE WEIGHT	PKG#	BIN #
AH6 375	1	GE Tape Recorder				
AH6 376	1	TDX 90 Minute Audio Tape				

RECEIVED BY

IGNATURE OF PROPERTY CUSTODIAN **PERSONNEL #** **DATE/TIME**

ADDITIONAL REMARKS (READ REVERSE SIDE FOR FOUND PROPERTY)	DISPOSAL STATUS CHECK DATE	DISPOSITION	INITIALS

Plaintiff's Exhibit 9

CHECK ONLY ONE: [X] IMPOUND [ ] EVIDENCE [ ] NON-IMPOUND TOW [ ] SEIZED UNDER RCW 69.50.505	WASHINGTON STATE PATROL AUTHORIATION TO TOW / IMPOUND AND INVENTORY RECORD

VEHICLE INFORMATION							GENERAL INFORMATION
LICENSE	STATE	YEAR	MAKE	MODEL	STYLE	COLOR	CASE / EVIDENCE NUMBER
N7ERW	WA	87	CAD	FLEET	4 DR	MAROON	

VIN	MILEAGE	REASON FOR IMPOUND
1G602S8Y8H9745025	68055	ARRESTED AAA WOULD NOT RESPOND

REGISTERED OWNER	LEGAL OWNER	DRIVER
NAME (LAST, FIRST, MI) ALFORD, JEROME A.	NAME (LAST, FIRST, MI) SAME	NAME (LAST, FIRST, MI)
STREET ADDRESS 1728 GREGORY WAY	STREET ADDRESS	STREET ADDRESS
CITY, STATE, SIP CODE BREMERTON, WA 98337	CITY, STATE, SIP CODE	CITY, STATE, SIP CODE

AUTHORIZATION AND RECEIPT

ON THIS DATE OF 11-22-97 AT 2100 (24 HOUR) PURSUANT TO RCW 46.20.435 AND/OR RCW 46.55.085/.113 AND HAVING PERSONALLY

INVENTORIED THE ITEMS IN THE DESCRIBED VEHICLE, I HEREBY AUTHORIZE MT. VIEW (TOWING FIRM) TO REMOVE THIS VEHICLE FROM SR 16 MP 15

OFFICER'S SIGNATURE //S//

I CERTIFY THAT I HAVE RECEIVED THE ABOVE VEHICLE AND ITS CONTENTS LISTED BELOW.

TOW DRIVER'S SIGNATURE //S// DOL TRUCK NO. 5G48 003 DATE 11/22/97

EQUIPMENT	DAMAGE		EVIDENCE (DRIVER'S SIDE)	EVIDENCE (PASSENGER'S SIDE)
[ ] GLOVE BOX LOCKED [X] KEYS [2] [X] AUTO STEREO FUNCTIONS [X] STEREO TAPES [3] [ ] CB RADIO [X] RADAR DETECTOR [ ] TRUNK LOCKED [X] SPARE TIRE	[X] FRONT [X] R FRONT [ ] R SIDE [ ] R REAR [ ] L FRONT [ ] L SIDE [ ] L REAR [ ] REAR	SHADE DAMAGED AREA	DASH UNDER DASH FRONT FLOOR 	DASH UNDER DASH FRONT FLOOR

(cont'd next page)

[X] JACK [ ] CHAINS [ ] OTHER _____	[ ] TOP [ ] UNDERCARRIAGE SIDE DAMAGED AREA [ ] OTHER	UNDER FRONT SEAT	UNDER FRONT SEAT
		ON FRONT SEAT	ON FRONT SEAT
INVENTORY			
Knife, - Alinco two way radio - misc clothes Kenwood multiband - Title 46 RCW book green back pack - small cooler w/misc (?) w/papers colored pens. - drugs and papers misc overcounter meds - Nokia cell phone headphones – head light		REAR FLOOR	REAR FLOOR
		ON REAR SEAT	ON REAR SEAT
		TRUNK	TRUNK
		OTHER	OTHER

Plaintiff's Exhibit 16

Washington State Patrol

Field Intelligence Report

NAME: LAST: ALFORD,	FIRST: JEROME	A.		AKA'S	
SEX: M	RACE: W	HEIGHT: 5 08	WEIGHT: 182	HAIR: BRO	EYES: BRO
DOB: 11 - 3 - 52		SOCIAL SECURITY NO.: 538-44-1611		OTHER ID NOS.	
DRIVERS LICENSE NO.: ALFORJA 486QC		STATE: WA		SCARS, MARKS OR TATTOOS	
ADDRESS: 13688 NW COHO RUN				PHONE NO.	
CITY: BREMERTON				STATE: WA	
YEAR: 87	MAKE OF VEHICLE: CAD		TYPE: FLE 4D	COLOR: MAR	
LICENSE NO.: N7ERW	STATE: WA		REGISTERED OWNER: SAME	VIN NO.	
OCCUPATION		EMPLOYER			
LOCATION OF INCIDENT: EB SR16 E/O BURNHAM			DATE: 11-22-97	TIME: 1920	
ASSOCIATES WITH SUBJECT					
DETAILS: SEE ATTACHED					
//S// J. HANER				1111	
REPORTING OFFICER				PERS. NO.	
01					
DIST.					
14		RETURN TO:			
Det.			WSP INVESTIGATIVE ASSISTANCE DIVISION P.O. BOX 2347 Olympia, WA 98507		

WASHINGTON STATE PATROL

FIELD INTELLIGENCE REPORT

Jerome A. Alford

Subject had pulled in behind a disabled vehicle, whose occupants believed he was a law-enforcement official because of the wig-wag headlights installed in his vehicle. As I approached, he hurriedly left the scene. After a brief conversation with the occupants of the disabled vehicle I followed the maroon Cadillac and pulled it over. Mr. Alford claimed that the wig-wags were part of his alarm system, but this could not be verified. Also, it was discovered in the course of the traffic stop that he had a tape recorder under a jacket and had been recording the entire proceedings. He had not advised me or Sergeant Devenpeck that he was doing so. He also had a second tape recorder hidden under the dash. He claims to believe that it is legal to tape conversations on public highways. He has recorded other police officers in the past, and it is my belief that he will continue to do so if stopped. He will claim that he is a former law enforcement officer out of Texas and the Puget Sound Naval Shipyard.

Mr. Alford has an amateur radio and at least one scanner in the vehicle and monitors police frequencies. All of my radio traffic concerning him was heard and recorded. He travels from Bremerton to Milton via SR 16 and 15 every Friday and Saturday night. If he is stopped again, I recommend that the contacting officer use his or her cell phone to obtain or relay any information about him.

Trooper Joi Haner, #1111

Plaintiff's Exhibit 20

The Honorable ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD, Plaintiff, v. WASHINGTON STATE POLICE, a Washington State Agency; JOI HANER, Washington State Patrol Officer, and JOHN DOE HANER, her husband; SERGEANT GERALD DAVENPECK, Washington State Patrol, and JANE DOE DAVENPECK, his wife, Defendants.	No. C99-5586RJB DECLARATION OF GERALD DEVENPECK

I, GERALD DEVENPECK, being over the age of 18 years and competent to testify, make the following declaration based on personal knowledge.

1. I ~~am~~ *was* [handwritten] a Sergeant with the Washington State Patrol.

2. On November 22, 1997, I was requested by Trooper Joi Haner to respond to a vehicle stopped on SR 16 which was driven by Jerome Anthony Alford. Trooper Haner had stopped Mr. Alford's vehicle

because of possible wig-wag headlights, which I knew to be a violation of RCW 46.37.280.

3. When I asked Mr. Alford to display the operation of his lights, Mr. Alford responded the lights were part of the alarm system he had just installed and he was not familiar with the exact operation. I asked Mr. Alford to open the hood so I could look for a flasher unit that powered the wig-wags but I did not observe a flasher unit.

4. When Mr. Alford returned to his vehicle he moved a jacket and I observed something shiny and black. When I looked closely I saw that it was a tape-recorded and that the play and record buttons were pushed down.

5. I then had Trooper Haner remove Mr. Alford from the vehicle and removed the tape-recorded. When I rewound the tape I could hear my voice and that of Mr. Alford. I stated that at no time did Mr. Alford announce his intentions to record our conversation nor did Mr. Alford ask permission to record the conversation.

6. While I was inventorying the vehicle for impound I located a switch under the steering column that appeared to be a wig-wag activation switch. When I turned on the switch the high beams started flashing in the alternating manner.

7. I had been trained by WSP on the general application of the Privacy Act, RCW 9.73.030, but was unsure of its applicability to the facts surrounding the situation presented by Mr. Alford's case. Therefore, as a matter of policy, I contacted a Pierce County Deputy Prosecuting Attorney to

determine the statute's prohibitions and whether I had a legal basis to arrest Mr. Alford. Based on my conversation with the Deputy Prosecuting Attorney, Mr. Alford was arrested for making an illegal tape-recording and issued a citation for unlawful flashing headlights.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

June 26, 2000
Pierce County
(Date and Place)

/s/
GERALD DEVENPECK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
[Caption Omitted in Printing]

EXCERPTS OF TRANSCRIPT OF TRIAL

Tuesday, January 2, 2001

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* * *

[16]

Q. Where did you go to school?

A. I started out at Central – what we called Central Grade School. Then I went to Naval Avenue after that. Coontz Junior High School. And then graduated at West High School in '72.

Q. Where is that?

A. It's in Bremerton.

Q. Are you feeling okay today?

A. I could be better. I'm a little nervous; a little stressed.

Q. Are you on any medication right now?

A. Yes, I am.

Q. What is that?

A. Xanax at night and Valium along with the trial, to keep me mellow.

Q. Is that prescribed medication?

A. Yes. Dr. Shuler prescribed Xanax; and Dr. Snyder, the Valium.

Q. Why was that prescribed? Did you request it?

A. Well, I told him I still – it still bothered me about the arrest, and talking about it and reliving it was just giving me a lot of problems sleeping and concentrating.

Q. But are you able to understand what's going on here today?

A. Yes, I am.

Q. But are you able to understand what's going on here today?

A. Yes, I am.

Q. It's not affecting you?

A. No.

Q. Now, after you graduated from high school, where did you go?

* * *

[30]

about a day and a half to find where I was – took off from work and went looking for the child until we found him.

Q. Let's fast forward to November of '97. Where were you working at the time?

A. I was working at Puget Sound Naval Shipyard as an auto mechanic and part time at Bud's cocktail lounge in Milton.

Q. Why were you working the part-time job?

A. I had just started building a new house and I had the frame up and I needed some extra money, and

by working the weekends I could work on the house, to get it completed.

Q. Were you working any overtime at the shipyard?

A. I was also working overtime at the shipyard on the weekend as well.

Q. So you were doing both?

A. Yes.

Q. Now, had anything gone on in your personal life in the years preceding November of '97 that had an effect on you?

A. Divorce. And that was 1994, and it ended in 1995.

Q. Had you sought any counseling?

A. Yes, I did, for the children and myself.

Q. And how was that counseling going?

A. Very well. I had two good counselors.

Q. Who were they?

A. Well, Dr. Shuler, Gail Shuler, is one of them, and then I had a couple of other ones.

* * *

[34]

avoid leading the witness.

Q. (By Mr. Phillips) So what did you do when you got off work?

A. Well, I went to pick my car up and it was late. I got off at 4:30 and picked my car up at about 5:15, 5:30. I went over to pick the car up and it wasn't done yet, so that wasn't too good because I had to

be at work between 8:30 and 9:00 over in Milton which didn't give me much time. So I had to wait around until the car was done. They finally finished the car shortly after six o'clock. I had to dash up to my house and change my clothes and then head over to Milton to get to work.

Q. What happened then?

A. On the way down the road, I saw this car pulled off the side of the road sitting there. It looked like they were trying to jack it up. It was raining out, dark, windy. So I pulled my Cadillac over and stopped. Being a mechanic, I do it all the time. I pulled over. I set my alarm system in the car because now days, as much as you want to help somebody, you don't know if you will get mugged or not. At least if I get mugged somebody will know something is going on.

Q. How did you set the alarm system?

A. I had control – I had a control that had four buttons on it, so I pushed the couple of button [sic] that I was pretty sure would arm the system.

Q. Okay. So what happened?

A. Well, I got out of the car, and a couple of young kids, they

[35]

were teenagers, probably 16, 18 years old, were driving a small car. They had a flat tire. I believe it was the right rear tire was flat. They were trying to jack it up in the dark, and the jack kept slipping off in the mud, so I got a flashlight out, a little cheap 99-cent flashlight like you can buy at

the store, and I helped them position the jack and jacked the car up and made sure they busted the lug nuts loose.

Q. Okay. Then what happened?

A. While they were doing that, I looked at my watch, and I said, "Look guys, you can have this cheap flashlight, but I have to get to work." I said, "I've got to be at work in Milton between 8:30 and 9:00 and it's already after 7:00, so you can probably handle it on your own."

Q. Okay. So what did you do then?

A. I got in my car and headed off to work.

Q. Did you see anybody else?

A. Yes, I saw a car pull in behind me.

Q. Did you recognize the car?

A. No. Because I was already getting in my car when it pulled up. I was just going sideways as it pulled up.

Q. So what did you do then?

A. Got in my car and drove off headed toward work.

Q. When you went back to your car, did anything happen?

A. Well, the alarm went off. The lights started flashing. And as I approached the car, I guess I got too close to the sentry

[36]

on it and set it off. I forgot you had to push a button to disarm it after you alarm the system because I wasn't too familiar with it yet.

Q. Okay. What were you wearing that night?

A. Well, something similar to this. I was wearing actually blue jeans, but a western-type shirt. Dark shirt like a plaid.

Q. Any hat?

A. No. I don't wear hats.

Q. So what happens as you are driving down the road?

A. I drove down the road not very far, maybe a mile or two, not too far. A car comes up real fast behind me and then turned on some lights. I knew it then was a police car of some sort. I thought he might be in pursuit of somebody, so I pulled off and let him go by. He didn't go by, he stayed behind me, so I just pulled over.

Q. What happened then?

A. He started asking me about my headlights on my car.

Q. Have you had an opportunity to listen to what's been marked as Plaintiff's Exhibit 1?

A. Yes, I have.

Q. Is it an accurate recording of what happened that night?

A. Yes, it is. I had some music on the tape I was listening to. When the officer stopped me I turned it on and started recording.

MR. PHILLIPS: Move Exhibit 1 into evidence and as to

* * *

[50]

on the phone and he commented that he had trouble with his being more irritable around his children and he wanted to control that.

Q. Did this continue to manifest itself over a period of time after the arrest?

A. Well, I didn't hear much from him, so I assumed that it had calmed down, but then when he did contact me he had been to court twice and said he started to have nightmares about it.

Q. Did you form any sort of a diagnosis after these contacts with him relating to the arrest?

MR. MENTZER: Objection, Your Honor, to opinion testimony.

MR. PHILLIPS: Your Honor, I believe there are several cases under Rule 26.

THE COURT: Well, wait a minute. The question was, did you form a diagnosis?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: She may answer.

Q. (By Mr. Phillips) Did you form a diagnosis?

A. Again, I felt it was an adjustment reaction. But I would add, Mr. Alford also saw some other providers in our clinic for family counseling and around his divorce and also around some injuries he had which was resolving some problems at work, so we had followed him for some time, and I was also including a diagnosis of personality disorder not otherwise specified, which

* * *

[57]

A. It says the patient left a message stating he had spent the weekend in jail and needed something to calm him down.

Q. And what was your advice to him?

A. I asked the nurse to tell him that he could increase the Klonopin, which is antianxiety medicine that he was already on, from two milligrams, increase it to three milligrams for a week; recommend he contact his therapist, and I don't know if she documented it, but she set up an appointment with me, also.

Q. And what was Mr. Alford's demeanor at that time?

A. When I saw him on December 5th, which was about two-and-a-half weeks after that, he was still pretty agitated. He just talked nonstop.

Q. You also diagnosed him – you have several diagnoses written down here. One's the adjustment reaction for anxiety. Could you explain undifferentiated somatoform disorder?

A. Well, that was the diagnosis that was added when he was evaluated at the clinic by some of the other providers for some of the physical problems he was having, and with undifferentiated somatoform disorder, there's one or more physical complaints, but when they are medically assessed, either they can't really explain where the symptoms or pain are coming from, or if there is a general medical condition, it – the symptoms

and disability are beyond what you would normally expect from the findings.

Q. Now, on December 16th, looking at the chart note there.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Caption Omitted in Printing]

EXCERPTS OF TRANSCRIPT OF TRIAL

Wednesday, January 3, 2001

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* * *

[93]

of the car. We're sitting on the side of the road on the shoulder, Highway 16, and they patted me down to make the arrest; leaned me up against the car to pat me down.

Q. How did they lean you up against the car?

A. Just kind of a nudge, kind of pushed me up against the car.

Q. So they pushed you up against the car?

A. Right.

Q. How did they pat you down?

A. The usual way. They went from, you know, up and down my sides, on my legs, and under my arms and back and front.

Q. Okay. And what did they tell you?

A. I was being arrested for illegal tape-recording.

Q. Did you respond to that?

A. Yes, I did. I said, "What?" I said, "Illegal tape recording?" And they said, "Yes."

Q. What happened after that?

A. I told them at that point it was not illegal to tape-record them.

Q. I'm sorry, how did you tell them?

A. Well, I told them that the statute, I had a similar experience with the Kitsap County Sheriffs, and at that point I requested information via the ACLU in Seattle and they sent me case law on the statute as to tape-recording, that the right of privacy is a reason not for an officer doing his job. It's all public record.

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Q. Let's go back to that incident with Kitsap County. About when did that happen?

A. That was in July. Late June, early July of that year.

Q. What year?

A. That year, 1997.

Q. Okay. What happened then?

A. I was pulled over for speeding on Seabeck Highway.

Q. Um-hmm.

A. And the deputy came up to the window and told me I was speeding, and I, of course, denied it, I wasn't speeding. And I told him that, you know, "I'm recording this conversation." I had the recorder going, and he look at it, and I said, "Yes,

I'm taping this for my own protection because I know I wasn't speeding. I did nothing wrong. I didn't violate any statutes."

Q. Um-hmm.

A. And he looked at me and he said, "I forbid you to tape-record me."

Q. He said?

A. "I forbid you to tape-record me."

Q. Okay.

A. I said, "I have nothing to hide. That's why I'm tape-recording this, so when I go to court for this ticket that you are going to write me there will be no misunderstanding as to what I said."

Q. Okay. What happened?

[95]

A. He grabbed the tape recorder and he shut it off. And I said, "I would like to talk to the supervisor out there about this." So we called down to the dispatch and he sent his sergeant out to talk to me. And I talked to him and told him the same thing. I said, "The statute and the case law says I can record this. I wasn't speeding, I have nothing to hide, and therefore I'm going to use this when I go to court."

Q. Um-hmm.

A. So the two officers went back to the sergeant's patrol car and they talked, and they came back and they said, "Well, we decided you weren't speeding so we're not going to cite you for that.

We're going to cite you for illegal tape-recording and confiscate your recorder."

Q. So what did you do after that?

A. After that I went to the courthouse and I filed a claim to get my tape recorder back because they took it.

Q. Um-hmm.

A. And they said that they would check into the law and see if it was illegal. After a couple of months, I got a letter back from the sheriff's office –

MR. MENTZER: Your Honor, I'm going to object to the hearsay.

THE COURT: Sustained.

Q. [By Mr. Phillips] What did you do to try and satisfy yourself as to what the Privacy Act said? Did you contact

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anyone?

A. Well, I contacted the ACLU a second time.

Q. Okay.

A. I told them what had happened.

MR. MENTZER: Again, same objection, Your Honor.

THE COURT: Well, there's no request for a hearsay answer yet, but the objection may be well-taken in a minute. We will see.

Q. (By Mr. Phillips) So you contacted the ACLU again.

A. Yes, I did.

Q. Did you end up getting your recorder back?

A. Yes, I did.

Q. So let's fast forward again to November 22nd. You had just been patted down and placed under arrest by Officers Devenpeck and Haner. What did you relate to them about what you had gone through with Kitsap County?

A. Well, I just advised them what had happened in Kitsap County in that time frame. It was sometime in June or July of that particular year that the same thing had occurred.

Q. Um-hmm.

A. And it was legal for me to record.

Q. Okay. Did you tell them anything else?

A. I gave them the – quoted them the name of the case law that I knew, that I was aware of, that I had received.

Q. Um-hmm.

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A. And the statute.

Q. Um-hmm.

A. And they went ahead and said, "You're still under arrested." I said, "Well, I can show you. I have a copy in the glove box from the information that was sent to me from the ACLU."

Q. So did you have that in the glove box?

A. Yes, I did.

Q. Okay. What was their reaction when you showed them that?

A. Officer Devenpeck said, "I don't need to see that. I don't care."

Q. Were those his exact words?

A. Something along that line. I couldn't give you an exact quote. But it was something along that line, that I don't need to see that; I don't care about it.

Q. Did you ever see him go look in the glove box?

A. No, he did not.

Q. Okay. So what happened after you told him that you had the case and the statute?

A. He said, "You're under arrest and put your hands behind your back," and then they handcuffed me.

Q. How did they handcuff you?

A. Well, do you want me to stand up and show you that or what?

Q. If the judge will allow.

THE COURT: Yes.

* * *

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check?" because I had my checkbook.

Q. How much cash did you have?

A. I had $375 cash on me.

Q. Okay. So would they let you post that?

A. No, they wouldn't. They wanted cash only or bail bond.

Q. Okay. So what happened?

A. I told them I could make a phone call so I can get out, because I didn't want to be in jail. I shouldn't have been arrested to begin with. And they said when they finished booking me, then I could make a phone call.

Q. Okay.

A. So I went over to the phone after, I don't know, after awhile. I made the phone call, tried to call my parents' house, and their line was busy.

Q. Why did you call your parents?

A. Well, they are the only ones I could figure that might be able to come up with some money to get me out of jail to pay the balance.

Q. Okay. Where do they live?

A. They live in Bremerton.

Q. So you tried to call your parents. What happened?

A. I got a busy signal a couple of times in a row and couldn't get through, and at that point they said, "Well, it's too late to make anymore phone calls. It's after ten o'clock, and you have to go to jail."

[104]

Q. Okay. So what happened?

A. So they took me – they took me down to this little room, kind of like a – a bunch of little rooms in a row, four or five little cubicles.

Q. Um-hmm.

A. And they told me to take all my clothes off and put on these jail-type clothes, put all my clothes

into a bag that I had, my shoes and shirt and pants and all the stuff I had, belt and so on.

Q. Was anyone watching you while you did this?

A. Not that I'm aware of, no. I was behind a little closed curtain in a little cubical.

Q. What were the jail clothes like?

A. They kind of reminded me of hospital clothes, hospital greens, only they were a different color. They were kind of a tan color. Real flimsy.

Q. How were you feeling at this time?

A. Pretty degraded. You know, immoralized like, you know. Just like a big common criminal.

Q. So what did you do after you changed clothes?

A. Well, then I came back outside and they took me down to the cell, and they said, "You will be staying in the cell over here." It was a cell – I'm trying to guess the size of it – probably about 30-foot-by-30-foot would be a close guess.

Q. What did it look like from the outside?

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A. You couldn't see – from the outside it was just a big wall with a steel door and a small window on it. Kind of black or dark gray. The gray wall was like all cement.

Q. So what happened when they opened the door, what did you see?

A. I saw a bunch of people laying around in there. It was about ten o'clock at night. They had a few,

like picnic tables in there, like you would see at a park, with benches attached to the picnic table.

Q. Um-hmm.

A. They said, "It's going to be kind of crowded. We have about 20 something prisoners in here." It's a 12-man cell, and they had people sleeping on top of the tables and people sleeping on the benches and on the floor. They gave me kind of a rolled-up, like a straw mattress, like, I guess, like a military-type, and a blanket. I didn't have a pillow. They gave me a pillow case, so I rolled that up to make a makeshift pillow out of it.

Q. Um-hmm.

A. And told me to go and find a place on the floor to sleep somewhere.

Q. How was the lighting? How could you see where to go?

A. Real dim. They had like a dimmer. They had one light in the middle of the room with a wire mesh screen over the top, and it was like a dim, real dim light, like about a ten-watt bulb. You know how you dim your lights with a dimmer switch that goes

[106]

down.

Q. Um-hmm.

A. It was real dim. So I just walked carefully so I would step [sic]on anybody, because I had to step over bodies to get through to find a place to lay down.

Q. Did you find a place?

A. I found a place over in the corner, far corner. It had one little spot. It was probably five or six feet by a couple feet wide. There were a couple more guys laying close to that area, so I just put the mat down there and laid down over there.

Q. So what did you do then?

A. Tried to go to sleep, tried to forget, you know, tried to relax, and it didn't work too well. There was a clock up there on the wall that I could see that had a wire mesh screen around it, and it was kind of like a lit-up background on the clock so you could read it. So I just laid down and had my face kind of staring at the clock like this (indicating) and just kept looking at the clock trying to go to sleep. And then I noticed after a few minutes, I thought, gee, there's a pay phone over there. So –

Q. Where was that?

A. It was in the jail, in the cell. It was kind of towards the middle back corner of the cell.

Q. Uh-huh.

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A. Two pay phone. So I went over there and I thought, I will go ahead and call from here and see if I can't get my folks on the phone again or get bailed out.

Q. Un-huh.

A. So I got no phone – no – I tried to call and the phone was dead at that point. It didn't work, and

I kept trying it, and a couple of the prisoners said, "Hey, that phone won't work until morning," six, seven, eight o'clock or whatever time it would be.

Q. Okay.

A. So I went to go lay back down again, kind of get off in the corner, and I was laying there for a little while and I kept looking at the clock, and about every half hour or hour I would look, like eleven, twelve, one, two. It kept clicking away. I couldn't sleep; I was just shaking. And finally I was to the point where I almost dosed off, and I saw something run beside me and it was a mouse, and that kind of gave me the heebie-jeebies, too. So then I just kind of sat up in the corner and just covered myself up with the blanket and just kept watching the clock.

Q. Could you tell us what the toilet facilities were like in the cell?

A. They had two steel toilets, stainless steel. They just kind of hung off the wall out in the middle in the open. There was no barrier around them. You just kind of walked up there and

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you just used it in front of everybody, if you had to use it.

Q. Did you have to use it?

A. Several times, from about midnight on.

Q. Why is that?

A. I had diarrhea and just nervous, I guess. The nerves were just shot.

Q. Okay. So what happened in the morning?

A. Well, I kept trying the phone, like I said, every couple hours, and finally got a dial tone. So I called my folks, and they answered the phone. And my dad is real hard of hearing, he's 85 years old. He would have been about 81 or '2 at the time and he has hearing aids. So when I called there, but when you callout on the jail phone it comes out on a recording, it says, "This is a collect call from the Pierce County Jail," and it's kind of soft, it's not very loud.

Q. Uh-huh.

A. So my dad just hung the phone up. Click. He couldn't hear nothing. So I thought, well, I will try and call somebody else.

Q. Okay. Who did you try to call?

A. I called up my girlfriend I was dating at the time. She lived over in Silverdale.

Q. Uh-huh.

A. Linda. And the phone rang and she picked it up right away and it came across that recording again, and she just hung it right up. So I tried two or three more times and she kept

[109]

hanging up. I thought, well, this isn't going to get me anywhere. So then I called my sister up.

Q. Where does you sister live?

A. She lives in Silverdale.

Q. Okay.

A. She answered the phone. I told her what happened and where I was, and she was just about in tears on the phone. She said, "I can't believe it." She said, "I don't have any money, cash on hand; I can't come and help you out. I will get ahold of mom and dad." She said, "It's just going to kill them."

MR. MENTZER: Your Honor, I object and move to strike. It's hearsay and it's irrelevant.

THE COURT: Well, the motion to strike is granted. The jury should disregard what Mr. Alford's sister said.

Q. (By Mr. Phillips) So what happened next?

A. After my sister got on the phone, she did go ahead and call my parents. She got ahold of them because she, you know, wouldn't give you that weak recording. So she called on the phone and talked real loud to my parents, apparently.

MR. MENTZER: Same objection, Your Honor. It's hearsay.

THE COURT: Yes, the objection – well, it's not necessarily hearsay, but the objection is sustained. The jury should disregard the last answer. There's no foundation.

Q. (By Mr. Phillips) Let's go on, what happened to you. After

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you made the phone call to your sister, what did you do then?

A. I just went back down and laid down and tried to relax a little bit because I knew that, you know, she would take care of – get me out of jail somehow.

Q. About what time was this?

A. This was about 8:30 in the morning.

Q. Okay. Had you had breakfast yet?

A. Yes, we had breakfast, I believe it was around 5:00 or 6:00 in the morning, 6:30, somewhere in there.

Q. How do they handle breakfast there?

A. They brought in a whole stack of trays on a cart, one tray per person, and then they had silverware that was plastic, you know, plastic silverware to use. And they came and passed out a tray to everybody and told them everything would be inventoried. You know, don't try and hide your plastic spoons and stuff. They will all be accounted for. So I sat down to this wonderful breakfast that they supposedly had for me.

Q. What was it?

A. I had a small bowl of cereal that was like in a little hospital bowl, a little tiny one. I believe it was Kix cereal, actually. It was colored like Kix cereal. A half pint of milk. I had something that appeared to be scrambled eggs, and then something that looked like a sausage. So I tried to eat a couple of bites, but I just didn't have an appetite. I just couldn't' eat it. So I put it aside on the table, and the guy

[111]

sitting next to me said, "You don't want it?" I said, "Well, no." He said, "I'll take it." So he ate my breakfast, and I just kind of sat there and waited. And they gave us a certain amount of time to eat, and then they came back in and they turned the lights way back down. They turned them up while we were eating so we could see what we were doing, and then they dimmed them back down real low.

Q. Okay. So what did you do after your phone call to your sister?

A. After breakfast, they have what they call a sick call where the people can go down to their dispensary, or whatever, to get medicine and that kind of stuff. And I was feeling pretty bad. I had a hammering headache, I hadn't slept, and I was tired. I thought, well, if I can go down there I can get away from this cell because this place is just – it was a small room that was all cement. They had – on the very back wall, they had like bars, and then another cement wall behind that, like they divided another cell and built it with cement. So you had some bars you could see, but you still couldn't see daylight, you had no windows.

Q. Uh-huh.

A. I thought, well, if I could get some aspirin or something for my headache, at least I'm going to get out of this place and see some daylight and see some actual human beings besides the drug users. And the one guy beside me had beat his wife with a

[112]

frying pan, so I wasn't too thrilled about being close to him either.

Q. So what happened on sick call?

A. Well, I went on sick call, and I sat there for probably a good half an hour, and this one guy told me that was sitting there, he's a – he said, "I'm a regular, I've been here plenty of times." And I said, "Well, it's my first time. I'm not too thrilled about it." So he said, "You could be here a couple three hours on sick call. They go through, you know, take their time." He said, "When are you getting bailed out?" I said, "Well, I called my sister and she's going to call my folks, I hope, and I should get bailed out pretty soon." He said, "Well, if you're sitting here in sick call" –

MR. MENTZER: Your Honor, objection. It's hearsay.

THE COURT: Sustained.

A. The assumption that I –

THE COURT: Wait a minute. Wait for a question.

Q. (By Mr. Phillips) So did you stay on sick call?

A. No. The feeling that I got from people was if I sat there at sick call, I would miss getting bailed out and be stuck there longer.

Q. So what did you do?

A. So I just told the guard there that, you know, I would rather go back to my cell and wait for my bail to be posted.

Q. Okay. So what happened then?

[113]

A. The took me back to my cell, which was better because I was there by myself. Everybody else, I think, except for one or two people were, you know, down at sick call getting their medications and whatever.

Q. Okay. How long did you have to wait to get bailed out?

A. It was between 10:30 and 11:00 o'clock.

Q. Okay. How did that work?

A. Well, I just sat there and waited, and all of a sudden somebody came to the door – jailer, I guess it would be – and they opened the door and said, "Alford." And I said, "Yes." And he says, "Come over here to the door," and I came over to the door. and "Your bail has been posted." I said, "Great. What do I gotta do?" You know. "Follow me." And so I didn't waste any time. I got up in a hurry and I made a shot for the door.

Q. Okay. And who was there when you went outside?

A. Well, the jailer was there and deputy, and they took me down to where my – to get my clothes. It was kind of like a check-in place, I guess, where they check clothes, after you've taken them off, in a bag. So I went and got my clothes and they told me to go ahead and get dressed.

Q. Um-hmm.

A. Put my own clothes back on.

Q. Okay.

A. So I went down, in one of those little cubicles again, and

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got dressed (snaps fingers), I mean like that. I was dressed like in a minute. And then I went out in front and had to sign a receipt for my clothes that I had just put on, and they gave me back my wallet and checkbook and change, keys, personal effects that I had. I had to sign for that.

Q. Okay.

A. Then they escorted me over to an elevator and said, "Take this elevator downstairs" to whatever floor it was, "and your folks will be down there. They bailed you out."

Q. So what happened?

A. Well, I make a track in a hurry for the elevator, and I got out of there. Went downstairs, and –

Q. Who was there waiting for you?

A. My mom was there, my – my mom, my sister, and my dad.

Q. How old – you said your father was 80 what?

A. He was about 81 at the time.

Q. How old was your mom at the time?

A. Seventy-six or seventy-seven.

Q. Now, how did you go about getting your car back?

A. Well, my car was impounded over to Key Center, which I guess is over here by Purdy somewhere, if

I remember right. So I had to go get my car, and I asked my folks and sister to drive me over there, and they did. They drove me over to get my car. My mom looked at me, and she –

MR. MENTZER: Objection, Your Honor.

[115]

THE COURT: Sustained.

MR. MENTZER: It's hearsay.

Q. (By Mr. Phillips) Keep going.

THE COURT: No; wait, wait. I sustained the objection. What's the next question?

Q. (By Mr. Phillips) Keep going telling us about going to get your car, but without relating what was said or heard.

A. They said – I was told there was money to take care of the car, to get it out of impound; if I needed the money, that there would be money to get it out. Well, I had my cash with me that I had turned in, and I was hoping that I had enough to get the car out of impound. So they drove me over to the impound place at Key Center. And I don't recall the exact charges on it. I think it was in the neighborhood of $200 to get my car out of impound.

Q. So you were able to get your car out of impound?

A. Yes. I went over to get my car, and the battery was dead, but we fired it off, got it going, and then I was able to get my car out of there. I had to pay cash. They wouldn't accept any checks either for the impound of the car.

Q. Now, were you also given a citation?

A. Yes, I was given a citation.

Q. I will hand you what's been marked as Plaintiff's Exhibit 2. Ask if you recognize that?

A. Yes, I do.

* * *

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over there with you," and I can't remember the guy's name, a young kid, probably in his early twenties, red hair, "to go with you and you guys can handle it."

Q. Okay. So how did it go?

A. We got over there and went in front of the judge.

Q. Do you remember who the judge was?

A. Not by name, no, I don't.

We got in front of the judge, and the state said –

MR. MENTZER: Objection, Your Honor, as to what the state said.

THE COURT: Sustained.

Q. (By Mr. Phillips) What happened as a result of the hearing?

A. It was dismissed. The judge dismissed it.

Q. I'm going to hand you what has been marked as Plaintiff's Exhibit 3, two pages. I will ask you if you can identify those pages. Do you recognize them?

A. Yes, I do.

Q. What are they?

A. The first page is the court order, what they call Time Pay Agreement, I guess, and on here it says, "Dismissed." And the judge's name, I can't quite make it out. It looks like T. Aflkus, something like that.

Q. And what else is written on that?

A. It says, "Tape recorder and tape to be returned to defendant or Attorney Tyner," signed by D. Nelson.

* * *

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distress. The being stopped at that particular time was not, no.

Q. Okay. Well, if you had been arrested and released on the scene, do you think you would have been distressed at that point?

A. Not nearly as much as I am now, no, sir.

Q. You had been arrested before.

A. Yes.

MR. MENTZER: I want to go back over the tape, and probably the easiest way for me to do that would be to have the tape and play the parts that I want to hear. May I approach and retrieve the recorder, Your Honor?

Thank you. I have to rewind it.

Q. (By Mr. Mentzer) You just testified that you admit that you started off your – pretty much

started off your conversation with Trooper Haner by lying to him. Is that right?

A. The only thing I said that was not the truth, that I worked with – that I was working in Texas. That's the only thing that was not true.

Q. Okay. Well, you actually testified – or you actually stated on the tape that you used to be a cop yourself, state patrol, and back in Texas.

A. Right.

Q. Have I got that right?

A. Right.

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Q. And that was not true.

A. Right.

Q. Okay. Why were you doing that, again?

A. Basically I figured if I threw another name out besides my actual police work, that he would just cut me a little bit of slack, professional courtesy.

Q. When you were at Puget Sound Shipyard—

MR. PHILLIPS: The tape is not all the way back to the beginning.

MR. MENTZER: Thank you.

Q. (By Mr. Mentzer) When you were at Puget Sound Naval Shipyard it was as a security officer.

A. My badge, the badge that I wore on my chest said police officer, it did not say security guard.

Q. Okay. One second only, I will find out where I am on the tape.

(Tape is turned on, then off.)

MR. PHILLIPS: There's music before that.

Q. (By Mr. Mentzer) Now, what is your understanding of what wig-wag headlights are?

A. My understanding of the wig-wag headlights, from what I have seen on police cars that were on the highway, is they go opposite. One will blink first, then the other, one goes off and the other goes on.

Q. When you were stopped in July by Kitsap County, that had

* * *

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A. You know, they installed it –

Q. Okay.

A. -- so it works. I mean, you put it in there and it works, it's supposed to work fine. I paid them X number of dollars. It was supposed to be in good shape.

Q. The whole thing was brand new.

A. Yes.

Q. You hadn't had wig-wag headlights before that.

A. No.

Q. Okay. You didn't have some sort of flashing headlights before that.

A. No.

Q. Okay. And the first you learned that it was broken or not working right was when Trooper Haner asked you to activate it and you couldn't.

MR. PHILLIPS: Object. Asked and answered.

THE COURT: He may answer.

A. Correct.

Q. (By Mr. Mentzer) Okay. How is it later in the conversation that you know that they ordered a new relay because that one wasn't working and you were going to get it on Tuesday or Wednesday?

A. Because the relay I ordered was supposed to make the lights stay on longer which would affect the lights as far as the parking lights and headlights flashing. They only flashed

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temporarily for few seconds and quit, whereas I wanted them to flash a few minutes while I was walking across the parking lot. So I knew the lights were working, but they weren't working to their full potential to what I understand they should be functioning.

Q. Okay. What you wanted was an improvement, not a repair.

A. Right.

Q. Now, what would happen when you would activate it? Would it be the headlights would flash?

A. Headlights and parking lights, yes.

Q. And the headlights point forward.

A. Yes.

Q. Okay. So how does that – how do the headlights add to the safety if they are pointing forward and traffic is approaching you from behind?

A. It depends what kind of roadway I'm parked on. What area I'm in. As I stated, in Search and Rescue you park on the side of a hill or side of a ditch or a median.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) Now, at this point Trooper Haner is going back to his vehicle.

A. Yes.

Q. Okay. Now – well, I will get to that in a second. So what we hear transmitting is again your radio, not Trooper Haner's or –

* * *

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Haner goes back with your identification, registration, insurance, and when Trooper – or when Sergeant Devenpeck comes up to your car. Do you know what they were doing?

A. Not really.

Q. No idea.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) Why did you carry the RCWs related to motor vehicles in your car?

A. Just – well, I read over it, you know, when the Kitsap County Sheriff pulled me over, of course. I read it and I just put it in the glove box and just left it in the car.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) Now, that's when you are talking with Sergeant Devenpeck about why you believed the flashers were okay.

A. Correct.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) Now, what you're talking about there is not the wig-wag headlights.

A. Right. It was about tape-recording. I was confused about what the point was.

Q. You were confused?

A. I was a little upset, so I was trying to talk to them about tape-recording, not the headlights at that point.

(A portion of the tape was played.)

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Q. (By Mr. Mentzer) Now, that says as long as you are off the roadway –

A. Yes.

Q. -- you are not impersonating.

A. Right.

Q. So it sounds to me like you're talking about wig-wag headlights.

A. At that point I was talking about the lights.

(A portion of the tape was played.)

Q. (By Mr. Mentzer) So you're going from talking about recording –

A. To the lights.

Q. – which the officers didn't even know you were recording at that point, did they?

A. I don't know. I wasn't sure.

Q. You hadn't announced it to them.

A. I hadn't announced it to them, no.

Q. You hadn't asked for their permission.

A. No.

Q. But you went from talking about recording then to the wig-wag headlights.

A. Right.

Q. And you just testified that you hadn't had the wig-wag headlights –

A. Correct.

* * *

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A. No. No.

Q. You did not?

A. No.

Q. They were not part of the prior alarm system that was in there?

A. Not the first alarm system, no.

Q. The one that was installed on November 22nd, 1997, they were installed, flashing headlights?

A. No. The lights were supposed to be wired into the system to flash light, the parking lights. They were not wired into separate flashing lights.

Q. It's your testimony they were never – you had never had installed flashing headlights on the Cadillac that you were driving on November 22nd, 1997?

A. Correct.

MR. MENTZER: Thank you. That's all I have.

THE COURT: Okay. Thank you. You may step down.

(Witness excused.)

THE COURT: You may call your next witness, Mr. Phillips.

THE WITNESS: Do you want this book back or left up here, Your Honor?

THE COURT: Just leave it there.

MR. PHILLIPS: Call Christy Remley.

THE COURT: If you will step to the lectern and raise

* * *

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to the restroom, got up and watched TV. I'm a real light sleeper so I hear all this.

MR. PHILLIPS: Thank you.

THE WITNESS: Um-hmm.

MR. MENTZER: I don't have any questions, Your Honor.

THE COURT: Okay. You may be excused. Thank you.

(Witness excused.)

MR. PHILLIPS: We rest.

MR. MENTZER: Your Honor, I would like to make a brief CR 50 motion before we start our case.

THE COURT: Can we reserve those, or do we need to do it now?

MR. MENTZER: Well, I guess we could do it at the end of the day.

THE COURT: I would prefer to.

MR. MENTZER: All right. I can accommodate that.

THE COURT: All right, they may be reserved. And you may call your first witness.

MR. MENTZER: Thank you, Your Honor.

I will call Trooper Joi Haner.

JOI HANER, DEFENDANTS' WITNESS, SWORN OR AFFIRMED

DIRECT EXAMINATION

BY MR. MENTZER:

Q. Please state your name for the record, please.

A. Joi R. Haner.

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Q. How are you employed, Mr. Haner?

A. I'm a trooper with the Washington State Patrol.

Q. How long have you been a trooper?

A. I've been employed with the State Patrol now for nine years.

Q. And have you received any training in that regard?

A. Yes, I have.

Q. What training?

A. I went through 19-and-a-half weeks at the State Patrol Academy and then another eight weeks – or correction – six weeks of on-the-job training before graduation.

Q. Okay. When was that?

A. I graduated in May of '93.

Q. And prior to becoming a trooper, what was your educational background – or what is your educational background?

A. I've got a two-year college degree, just an AA in general studies.

Q. Now, what, generally speaking, are your duties as a trooper?

A. Traffic law enforcement.

Q. Do you ever assist disabled vehicles?

A. Yes. That's part of my traffic duties.

Q, What does that involve?

A. I will pull in be- -- if I notice a disabled vehicle, I will pull in behind them. If they have a flat tire system, changing them. Transport them off, maybe get some gas, give them water if they are overheated. Make phone calls, or have my dispatcher

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make phone calls, if needed, or call them a tow truck, if they would like.

Q. Is that a required element of your job?

A. Yes, that's part of my job.

Q. Do you have the option of stopping or not stopping when you see a disabled?

A. No, we are to stop if we see one.

Q. In 1997, who was your immediate supervisor?

A. Sergeant Devenpeck.

Q. Have you had any training in traffic laws?

A. Yes, I have.

Q. What kind of training have you received?

A. Well, through the academy we received numerous hours of traffic laws, reading them, reviewing them, being tested on them, as well as the criminal laws.

Q. Did any of that training involve flashing headlights?

A. Yes.

Q. What was your understanding of the law regarding flashing headlights?

A. Only operate as emergency vehicles were allowed to have flashing headlights or flashing lights or emergency lights.

Q. And prior to November of 1997, had you had any training of the Washington State Privacy Act?

A. What I received in the academy, as far as going over the criminal law and understanding the elements of the law.

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Q. Do you believe you understood the elements of the law?

A. Yes, I did.

Q. You were familiar with it in November of 1997?

A. Yes, I was.

Q. On November 22nd of 1997, did you stop Jerome Anthony Alford?

A. Yes, I did.

Q. Can you tell me how you came into contact or what made you come into contact with Mr. Alford?

A. Well, I was traveling westbound on State Route 16, between the overpasses of 154th and 144th in Pierce County. It's pretty close to the Kitsap/Pierce County line. I observed a disabled vehicle on the opposite side of the freeway, and as I was passing I observed another vehicle pull in behind. I decided to turn around at median at 154th and go back and check just to make sure they had everything they needed and they were all right and they didn't need any assistance. As I

pulled in behind the vehicles, they were both there. And I got out, and as I was walking up towards the occupants were standing at the front vehicle, Mr. Alford passed me and stated that they had a flat tire and needed a flashlight, and then just kept on walking and proceeded to get back in his car.

Q. Did he appear to be in a hurry?

A. Yes, he did.

Q. What made him appear that he was in a hurry?

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A. Well, he just walked right past me as he made that statement and kept on going. Normally they'll, if a citizen stops to help, they will sit there and talk with you as well as the people they are assisting. And a very common statement that they make is, "You're in good hands now, I'm going to leave. Take care."

Q. What were they doing, what were the people in the disabled vehicle doing to the car?

A. There was two males and they were changing the right front flat tire.

Q. Did you identify them?

A. No.

Q. Is it a normal procedure for you to try to identify somebody with a disabled vehicle?

A. No.

Q. Okay. Which tire was it again?

A. The right front.

Q. And where did you meet up with Mr. Alford?

A. It was between the disabled vehicle and his vehicle.

Q. Okay. Now, you didn't identify him at that point.

A. No, I did not.

Q. You didn't stop him?

A. No.

Q. Why not?

A. Because at that point I thought he was just a good Samaritan

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stopping to help. There was no reason to stop him. I didn't notice any violations or anything else.

Q. Okay. Did you make any indication of the license plate of the disabled vehicle?

A. No, I did not.

Q. Why not?

A. Because after I had made contact with the parties, they asked me if he was a cop. And when I inquired why they were under that impression, they told me that he had wig-wag headlights, and they were under the impression that he was a police officer. And at that time, Mr. Alford's vehicle was just passing us on the freeway because he had just merged into traffic, and I verified with them, I was pointing at the car, going, "That car right there?" They said, "Yeah, we thought he was a cop."

So then I made sure they were all right, they had a little yellow flashlight, were changing the tire, and had everything they needed, and then I proceeded back to my car.

Q. Did they make any indication where they received the flashlight?

A. They said Mr. Alford provided them with the flashlight.

Q. They didn't identify him by name?

A. No, they did not. They just said, "He left his flashlight here with us."

Q. Okay. So why did you go back to your car?

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A. One, that I wanted to go back and investigate what was going on. He had left his flashlight with them, and investigate that he had wig-wag headlights and why he was leaving the impression with these people that he was a police officer.

Q. Okay. Did you – did you broadcast anything over the radio?

A. Not at that time. I was trying to merge back into traffic and I was kind of having some concerns as far as what his intentions were and some fears for public safety because if he's pulling in behind cars and leaving an impression that he's a police officer, I didn't know what he was – what he was doing at that time. As I was catching up to his vehicle, I got hold of Sergeant Devenpeck and instructed him what I had and requested him to contact me.

Q. Okay. Tell me a little bit about the area where the disabled vehicle was. You mentioned it was on Highway 16.

A. Yes. In that area of Pierce County it's pretty – there's nothing around. It's just kind of desolate. The nearest exit is a mile behind us, and then it's approximately another three quarters of a mile down that road before you get to any services, and it's another two-and-a-half to three miles before you get to the next exit, and there's nothing there. It's just an exit ramp that goes into – eventually it will get to residential areas, but there's no services, no phones, no nothing. It's not a well-lit area. It's dark. Lots of bushes and brush. And as the night goes on, it becomes very desolate.

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There's nobody out there.

Q. Okay. So you mentioned that you asked Sergeant Devenpeck to contact you, is that right?

A. Correct.

Q. Okay. Did he contact you?

A. Yes, he did.

Q. What was the nature of that contact?

A. I requested him to contact me because I didn't know what I had. I thought I might have an impersonator or a "wanna be" cop, so to speak, and I wanted the supervisor there because I did not know what I was going to be getting into.

Q. What does that mean to you, "wanna be" cop?

A. It's somebody who – when I say that term, it's somebody who wants to be a police officer, has the paraphernalia. Goes around, follows police calls, is familiar with the lingo, listens to the radio traffic, but yet can't be one. And they're a person who will go around, they will pull up behind disabled vehicles, leave impressions that they are, and very – they can be at times dangerous.

Q. Have you had any experience with other people that you believe were "wanna be" cops?

A. No. This was actually my first experience with that. I have heard of other people contacting them, and I have heard of people pulling in behind disabled vehicles because several years prior to that there was a guy pulling in behind disabled

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vehicles on I-5 and –

MR. PHILLIPS: Object. Irrelevant.

THE COURT: I think we may have gone beyond the question now, counsel. What's the question to the witness?

MR. MENTZER: Well, I was asking what his understanding was of a "wanna be" cop or how he meant that term. And I believe the information, although it may have gone beyond the scope of my question, is relevant to the state of mind.

THE COURT: What's the next question?

Q. (By Mr. Mentzer) Does a person who you perceive to be a "wanna be" cop, does that cause you any professional concern?

A. Yes, it does.

Q. Why?

A. Because they will do things that cause public – concern for the public safety.

Q. In what way?

A. Well, they will pull in behind vehicles, they will assist them, but then they will take advantage of the people who are now disabled.

Q. And this is based on training that you had had?

A. Yes.

Q. This perception?

A. Yes.

Q. Okay. Now, when you say a "wanna be" cop, do you mean that in a derogatory manner?

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A. No, I do not.

Q. How do you mean it?

A. Classification, I guess. But it's not derogatory.

Q. Okay. Now, that was what you were concerned you had with reference to Mr. Alford.

A. Yes.

Q. And you explained that to Sergeant Devenpeck.

A. Yes, when he arrived.

Q. Okay. You didn't talk to him about it on the radio?

A. Just that I suspected I had a "wanna be" cop and requested his contact.

Q. Okay. How did you make contact with Mr. Alford?

A. When I stopped him, I contacted him on the passenger side of his vehicle.

Q. Well, let's go back a little bit. Did you activate emergency lights or what?

A. Yes, I did.

Q. What do those do?

A. I have a light bar on the top of my car with rotating blue lights, blue and red lights.

Q. Do you have wig-wag headlights on your vehicle?

A. Yes, I do.

Q. What's the purpose of those?

A. They're an attention getter for traffic.

Q. Did you activate them?

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A. I activated my overheads, and my wig-wags are on a totally separate switch. I don't recall if I did or not.

Q. Okay. Now, Mr. Alford responded to your emergency equipment.

A. Yes, he did.

Q. Pulled to the side of the road.

A. Yes, he did.

Q. And what did you do?

A. I then contacted him on his passenger side of his vehicle.

Q. Did you run Mr. Alford's license plate?

A. I couldn't.

Q. Why?

A. Because he had a dark, smoked, tinted license plate cover making it unreadable.

Q. You couldn't read it from where you were?

A. No.

Q. At what point could you read it?

A. As I was walking past it.

Q. How close?

A. As close as me to you or closer. I couldn't see it from my vehicle.

Q. Ten feet, what would that be?

A. Ten, maybe fifteen feet max.

Q. At 15 feet you could read it?

A. Barely. It was dirty, it was dark. I couldn't – I

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couldn't read it clearly.

Q. Now, why did you approach on the passenger side?

A. It's safer for me, and it usually catches the drivers off guard so if there's any potential violence that they are going to try to create, I usually then have – I've got better sight picture and an advantage.

Q. And did you tap on the window, or was the window already down?

A. I don't recall.

Q. Okay. What did you observe at that point when you got up to the passenger side of the vehicle?

A. When I contacted him, the first thing I observed was that he was listening into the Kitsap County Sheriff's Office frequency on his ham radio.

Q. Did that concern you?

A. Yeah, at that point. He was – at that point, yes.

Q. Why?

A. Because now I have, that I'm being told that he has suspected wig-wag lights, he's leaving the impression that he's a police officer, and he's monitoring the police frequencies.

Q. What does it matter to you whether he's monitoring the frequency?

A. Because he can hear all radio traffic and know exactly what's going on.

Q. Why is that important?

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A. Because if there's some sort of a situation that goes on or if he turns out to be a violent offender, he now has the drop. He has the advantage, he knows what's going on. He knows all the information that I know. He knows all the help that's coming and the plan of action that we're going to take to alleviate the situation the best

that we can. So he now has the advantage, we don't. We're at the disadvantage.

Q. Now, had you seen a police scanner before in stopping people?

A. Very rarely.

Q. They're not illegal, are they?

A. No.

Q. Did you notice anything unusual about Mr. Alford's?

A. Well, he had a microphone attached to it which was a ham radio, and I also noticed he had a portable held-hand scanner sitting next to it.

Q. What's unusual about that?

A. Most people that have scanners, they're in their house. They like to listen to the police frequencies and like to know what's going on. The majority of the people I've contacted who have had hand-held scanners are involved in some sort of criminal activity. They don't want the police around and they want to know where they are at all times.

Q. And what's wrong with having a microphone on the radio?

A. At that time I did not know if he was able to transmit on

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the emergency frequencies, which is illegal unless you have authorization.

Q. So what did you do?

A. I then inquired as to why he left his flashlight. And he told me that he had plenty of them, and he just – that they could have it.

Q. That was actually the first contact, the first thing you said to him, wasn't it?

A. Yes, sir.

Q. Did you notice anything unusual about – anything else unusual about the inside of Mr. Alford's vehicle?

A. Well, he had some – like a red jacket and some debris on his passenger seat, and I noticed some handcuffs in his back seat.

Q. You were present during the playing of the admitted tape yesterday –

A. Yes.

Q. -- from the stop?

A. Yes.

Q. And did that accurately portray what was going on at the time?

A. Yes.

Q. Okay. And he indicated to you that he had handcuffs.

A. Yes, he did.

Q. Did that bother you?

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A. Yes, it did.

Q. Why?

A. It was adding to my suspicion that he was an impersonator or "wanna be" cop because now he has the police frequencies, he's got a portable scanner he can take with him anywhere. He's got handcuffs to restrain somebody. And he's got lights that most people would accumulate with an emergency vehicle or a police vehicle and if they saw them while driving down the road would pull over.

Q. Okay. What happened next with your contact, with respect to your contact with Mr. Alford?

A. Well, I inquired about his flashlight, and he said that they could have it. He was – then he told me that he was – used to work for the State Patrol.

Q. That was the one in Texas that we've discussed?

A. Right. When he said State Patrol, I – at that time I was under the impression that he meant the Washington State Patrol. That's why I asked him when he worked for us.

Q. Did you believe that?

A. At that time, yes.

Q. Why?

A. Giving him the benefit of the doubt, he told me that he worked for the State Patrol, and then he changed it to Texas and the shipyard police. I had no reason not to believe him at that point.

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Q. Okay. Then what did you say, or what happened?

A. I then inquired if he had a gun in his car, and he told me that he did not, that he only had his

handcuffs and his other paraphernalia. Then I was inquiring about his headlights that the parties of the disabled vehicle had told me about.

Q. And do you remember what his response was to it?

A. Well, he said that they were part of his alarm system that he just had installed.

Q. Did you believe that?

A. Yes, and that's why I asked him to show me how – how they worked. I wanted to see how he had it installed.

Q. And what did he do?

A. He attempted to try turning them on. He was pushing buttons on and off on his key chain.

Q. Was that doing anything?

A. No, it wasn't doing anything. He was turning his four-way flashers on and turning his turn signal on, but there was no – he never got the lights to flash at all.

Q. Okay. Did you believe that he was making an honest effort to get those things going?

A. As he was going through it more and more, I was believing that he was being a little more evasive and he wasn't trying to turn them on. He was trying to avoid it.

Q. What made you think that?

A. Well, because he kept pushing the buttons, or it was looking

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like he was pushing buttons. There was no sirens going off, there was no lights being flashing, nothing was happening.

Q. Did you see any buttons in his car?

A. Just on his key chain it looked like he had some buttons.

Q. Nothing affixed to the car?

A. And there was one that I did notice down by his right knee but never did push it.

Q. He never pushed that?

A. No.

Q. At what point did you notice that?

A. Oh, as he was going along pushing the buttons and becoming a little agitated that he couldn't get it to work.

Q. Did you ask him to try that button?

A. No, I never did.

Q. Why?

A. I wanted to see if he could get it to work the way he said it was going to work and that it was his alarm, and he just kept going on and on that it was his alarm, and then – by then I forgot about the button.

Q. You did what?

A. I had forgotten about the button at that time because we had been going – conversing about his alarm, and I had been – he had pushed buttons,

and I had walked to the front of his car, looked to see if his lights were flashing, and nothing would work, and then I would come back.

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Q. Now, you mentioned that you were familiar with the law regarding flashing headlights.

A. Yes.

Q. And Mr. Alford, did he make any indication to you about any activities he might be involved in?

A. Well, he did say that he was part of Search and Rescue and Department of Emergency Management.

Q. Was it your understanding that he could have emergency lights for that?

A. No, he couldn't. As far as my understanding was, he couldn't have emergency lights for Search and Rescue or Department of Emergency Management. That he could only have like a yellow beacon.

Q. That was your understanding of the law?

A. Right.

Q. Now, at some point you – is it policy to ask for license registration and stuff?

A. Yes, it is.

Q. Did you ever ask for that?

A. Yes, I did.

Q. And what happened then?

A. I asked him for his license, which he provided, and I verified that he was still living at his current address, and he was – I don't believe he was ever able to find his registration.

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Q. Okay. And what did you do then?

A. I concluded that initial contact right there and went back to my car and ran his registration and his driver's check.

Q. Why?

A. I wanted to check wants warrants, see if he was suspended, and make sure he was the registered owner of the car.

Q. And at what point did Sergeant – or did Sergeant Devenpeck ever arrive at the scene?

A. Yes. After I had run Mr. Alford's data, Sergeant Devenpeck then arrived at the scene.

Q. And you were still in your car at that point?

A. Yes, I was.

Q. And then what happened when Sergeant Devenpeck arrived?

A. Sergeant Devenpeck contacted me, I advised him what I had, and then I – that I suspected he had wig-wag headlights but he was being evasive and not turning them on. And so – and all the other observations that I made: That he had the police frequencies, the handcuffs, and other things; that he left the impersonation that he was a police officer with the people who were disabled. And

then Sergeant Devenpeck looked up in the RCW book the flashing headlight statute.

Q. Okay. Where did he do that?

A. I believe he went back to his car and looked it up in his RCW book.

Q. Okay.

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A. Because I walked back – as I got out of my car, I observed him reading through the book.

Q. Now, when we listened to the tape yesterday, there's a long pause in between the time that you asked for the registration and the time that Sergeant Devenpeck contacts Mr. Alford. What was going on there?

A. That was the time I ran his data and Sergeant Devenpeck contacted me and I was advising him what was going on and that he was looking up the statute at that time.

Q. Which statute?

A. The flashing headlight statute.

Q. Okay. When you first contacted Mr. Alford, did he tell you you were being tape-recorded?

A. No, he did not.

Q. Did he ask you if he could?

A. No, he did not.

Q. Now, did you look around the interior compartment of his car?

A. Yes, I did.

Q. Why?

A. I – it's part of what you do when you stop a car, you're looking through the interior of the car. You want to make sure there's no handguns there, no guns, no weapons that could be used against you. Or periodically you will see drugs that they leave out plain and visible or drug paraphernalia. So you're

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looking through the car as they're there getting the paperwork and doing other things.

Q. So this is an officer safety kind of problem?

A. Yes, officer safety deal.

Q. Did you see a tape recorder?

A. No, I never did see a tape recorder.

Q. Did you know you were being tape-recorded?

A. I had no idea.

Q. And who was present when you first contacted Mr. Alford?

A. It was just myself and Mr. Alford on the side of the freeway.

Q. Was there anybody walking by?

A. No. There was nobody out there.

Q. What were the weather conditions?

A. It was cloudy and it was just a real light drizzle.

Q. Was it dark, light?

A. It was dark.

Q. And you mentioned that the streets are not lighted in that area.

A. No. They weren't lit in the area of the disabled, and in the area that we stopped, the nearest street light was the exit behind us, just to mark the exit.

Q. From where you were stopped, or where you were stopped when you were behind Mr. Alford, was – and it was just you and him; I'm specifying the period of time – were there any houses

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nearby?

A. No houses. There's a real estate business about half a mile back, but it's off the freeway. There's a – there's nothing around.

Q. No businesses, houses, or anything?

A. There's nothing in the immediate area, no.

Q. What is in the immediate area?

A. Just brush and trees.

Q. Okay.

THE COURT: This is a freeway, is it not, where you stopped him?

THE WITNESS: Yes, sir.

Q. (By Mr. Mentzer) Okay. What happened after you informed Sergeant Devenpeck of what was going on? He look at the statutes, and then what happened?

A. Then he contacted Mr. Alford.

Q. Were you with him at the time?

A. I was behind him, providing light. I was behind Mr. – or Sergeant Devenpeck providing my – as a cover officer.

Q. Now, what is his duties, or what are his duties in relationship to yours?

A. He's – he was my first line supervisor.

Q. What does that mean?

A. Well, he supervised the detachment that we had out at Gig Harbor at that time of eight people. His job was to oversee the

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work that we did, make sure the work was completed and done appropriately.

Q. What does he – does that mean you have to do what he tells you to do?

A. No. In some ways, yes.

Q. In what ways?

A. Well, if he gives us an order to go do something, then we have to do it. He's our supervisor. So you have to do what the supervisor says, but if there's an illegal order, we don't have to follow it.

Q. And how do you determine whether it's an illegal order?

A. Well, if he's giving me an order that violates the law, I don't have to follow it, or violates our regulation manual.

Q. Now, you were present when Sergeant Devenpeck went up to Mr. Alford's vehicle but you were behind Sergeant Devenpeck.

A. Yes.

Q. What side of the vehicle were you on at that time?

A. We were both on the passenger side.

Q. What happened then?

A. Sergeant Devenpeck then started conversing about the wig-wag headlights.

Q. Okay. And what was Mr. Alford's response to that?

A. I wasn't able to hear all of his responses.

Q. Okay. What was your role at this point?

A. Just a cover officer at that point, as Sergeant Devenpeck

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investigated what was going on.

Q. Okay. And you couldn't hear what was the complete conversation that was occurring?

A. No, I couldn't hear the complete conversation because the windows were up in the back.

Q. Okay. And at what point did you take an active involvement again, or did you ever take an active involvement again?

A. I took an active involvement when Sergeant Devenpeck asked me to have him removed from the vehicle.

Q. Did you do so?

A. I had him step out of the driver's side and step to the rear of the vehicle.

Q. Did you know why that was at the time?

A. At that point, no. When Sergeant Devenpeck, he came around the back of the vehicle, then I understood why.

Q. Okay. Let's go back a little bit. You didn't know why he told you to, but he asked you to remove Mr. Alford from the vehicle, is that right?

A. Yes.

Q. What did you do?

A. I had him step from the vehicle and step to the rear.

Q. Why was that?

A. That was at Sergeant Devenpeck's request, and it was not less than a few seconds later I was informed of why.

Q. Why bring Mr. Alford to the rear of the vehicle rather than

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leave him there at his door?

A. It's a safer position. Standing there by his door, traffic is zooming by us at 55, 60 miles an hour. Step to the rear of the car, there's more room, and there's space to get away from the passing traffic.

Q. And you didn't know why you were doing that?

A. Not right at that exact point.

Q. Were you wondering?

A. Yes. For a brief second.

Q. Were you concerned?

A. Somewhat, because I did not know exactly what he had found in the car or what he observed.

Q. Okay. So you brought Mr. Alford to between your car and his car?

A. Yes.

Q, What happened then?

A. At that time we got to the back of the car, Sergeant Devenpeck advised that he was recording us, and then advised Mr. Alford he was under arrest for making an illegal tape recording.

Q. What was your reaction when you heard that he was recording you?

A. At that time I believed – I was surprised he was recording us because I never did see a tape recorder.

Q. Were you looking for a tape recorder?

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A. No, I never looked for a tape recorder.

Q. Were you looking for objects?

A. I was looking for objects, yes.

Q. Do you know where Sergeant Devenpeck found the recorder?

A. He found it on the passenger seat. Front passenger seat.

Q. Were you looking in that area when you were observing the interior of Mr. Alford's vehicle?

A. Yes. Quite a bit, actually.

Q. You didn't see the recorder?

A. I never did see it.

Q. So what happened after Sergeant Devenpeck said he was under arrest for the recorder?

A. I placed Mr. Alford in handcuffs and advised him of his constitutional rights.

Q. Okay. How did you place Mr. Alford in handcuffs?

A. I just had him turn around –

Q. Explain that.

A. I had him turn around, grabbed his fingers, and then placed the left handcuff on and then the right handcuff on.

Q. Did you press Mr. Alford against the car?

A. No, I did not. I never.

Q. Why?

A. I never do it that way.

Q. Why?

A. Because it gives them a position of advantage. It gives

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them leverage, and they now have the advantage versus me. And I have never in my career used the car to handcuff a suspect.

Q. Mr. Alford was standing up then?

A. He was standing up, yes.

Q. And you had him – how did he get his hands behind his back?

A. I had him just turn around and place his hands behind his back.

Q. You asked him to do that?

A. Yes.

Q. And he did that?

A. Yes.

Q. And do you make any effort to gauge how tight the handcuffs were going on?

A. Yes. Once I put them on, once I have both handcuffs on, then I'll tighten them up, and I use my index finger. I slide my index finger between the handcuffs and his wrist to make sure there's adequate space so that they don't cut off circulation.

Q. Why do you use your index finger?

A. Because it allows enough adequate space so his hands can still move and they don't cinch down too tight, and I double lock the handcuffs so they can't tighten down at all.

Q. They can't tighten by leaning against them?

A. No. Once you double lock them, they're locked until you completely unlock them.

Q. Is using your index finger, is that part of your training in

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handcuffs?

A. No. Our training is to use actually the pinky finger.

Q. Why do you use the index finger?

A. It allows just a little bit extra space, a little more breathing room in the wrist. It makes it a little more comfortable.

Q. Then what did you do after having Mr. Alford handcuffed?

A. He was then advised of his constitutional rights, and which he stated that he understood them.

Q. Did you believe – when you heard that Mr. Alford – or Sergeant Devenpeck say that you had been recorded, or he – you had been recorded, did you believe you had probable cause to arrest Mr. Alford?

A. Yes, I did.

Q. What is probable cause?

A. It's the facts and circumstances that would lead a reasonable and prudent person to believe that a crime has been or is being committed.

Q. What about this situation made you think you had probable cause to arrest Mr. Alford for the Privacy Act violation?

A. Because the conversation was being recorded. I did not have any knowledge or give consent and he did not make any statements that the conversation was being recorded, and the fact that the tape recorder was completely hidden.

Q. Anything else?

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A. Well, under my understanding that that was in violation according to the RCW.

Q. All right. Were there any other factors you were considering?

A. No. It was based on those things. That was why he was arrested.

Q. Okay. And then what did you do after you read him his constitutional rights?

A. He was then talking about a case, Florez, but he was also mentioning Florida, and he was – he totally confused me. I did not know exactly what he was talking about. And then I placed him in my patrol car.

Q. Do you remember – do you remember whether you looked for a case or not?

A. In his vehicle?

Q. Right, in his vehicle. I'm sorry.

A. When we did go through his vehicle, the only case we ever saw was the RCW book that – or the title book that he had that Sergeant Devenpeck and him were reading back and forth in.

Q. Now, he had an RCW book?

A. Yes.

Q. What did that contain?

A. It contained the motor code.

Q. Okay. And which title was that?

A. That's Title 46.

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A. Yes.

Q. And how do you obtain copies of the cases?

A. We get monthly law enforcement digests.

Q. Is that a summary of the case or is that the case verbatim?

A. It's usually a summary of a case.

Q. In connection with your duties, have you ever read a case? The actual case rather than a summary or something.

A. No, I have never actually read the case, just summaries.

Q. What is your training on whether you have a question when you are out at the scene about the applicability of the law?

A. It's to contact the criminal prosecutor.

Q. Why is that?

A. It's because they are the ones that will be trying the case and they are the lawyers who actually read the cases and interpret them.

Q. Have you ever had anyone argue a legal perspective, make a legal argument to you about whether you were acting properly or not?

A. Usually the legal arguments they will bring up are equipment violations or motor code violations.

Q. What do you do then?

A. I'll understand their point, I will go look it up, and then I will take the book back with me and we will read over the actual statute and educate them on what it is saying and why I stopped them or why they are getting a ticket for the specific

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A. Yes. When I left the scene I was.

Q. And that was – I mean, after you had left the scene and you had the subsequent conversation with Sergeant Devenpeck about his contact with the prosecutor.

A. Yes, I was.

Q. Okay. And what happened next?

A. Well, once we arrived at the jail, and then I took Mr. Alford up to the booking area.

Q. What happened there?

A. Okay. We arrived at the jail in the sally port, and then I had Mr. Alford – before you go up into the jail, because you pull in, like he said, it's the basement, the sally port, you pull in there, and then you have to search them again in front of a video camera so that they know that there's no weapons or contraband being brought into their jail. I then did that, and we had to wait for them to send the elevator so we could go upstairs. Once we got upstairs, it's the booking area. I then directed Mr. Alford to have a seat on the bench and wait until his name was called.

Q. And were you with him the entire time?

A. Well, he has a seat on the bench, and then I proceed to another desk and have to fill out a booking form and then put it in a box, and that's how they decide – well, it's like a first-come-first-served basis, and they go through, and when they call his name, then he's called to the counter, and at that

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CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Highway 16 is a public road?

A. Yes, sir.

Q. There were cars driving by?

A. Yes, sir.

Q. You were on duty?

A. Yes, sir.

Q. In uniform?

A. Yes, sir.

Q. As was Sergeant Devenpeck?

A. Yes, sir.

Q. Driving marked patrol cars?

A. I was driving a marked patrol car. Sergeant Devenpeck has an unmarked patrol car.

Q. Okay. The purpose of coming up on the passenger side is to take the driver off guard?

A. It's an officer safety issue. It's – as I'm coming up on the passenger side, I'm away from traffic so my chances of being struck by a passing vehicle are less, as well as the majority of drivers look over their left shoulder for the police to contact, so if there is an instance where there is one who has a gun, he's looking left, I'm on the right. I now have the advantage.

Q. Did Mr. Alford ever refuse to do anything you told him to do?

* * *

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dismissed.

Q. The Pierce County Jail, is it a pretty busy place?

A. It can be, yes.

Q. Have you been there a number of times?

A. Yes.

Q. Have you ever arrested anyone for DUI?

A. Yes.

Q. Have you ever testified in court about something like that?

A. Yes, I have.

Q. Have you testified in court about other arrests you've made?

A. Yes.

Q. Have you testified in court about other citations you've issued?

A. Yes.

MR. MENTZER: I object to the relevancy of this, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Phillips) Now, what sorts of things do you generally testify to in a DUI prosecution?

A. Well, driving, physical observations that I observed, the field sobriety tests, if there were any. Speech, mannerisms, statements. The breath test.

Q. Speech. You testify as to speech. Give an example of that, if you would?

A. It would be, was his speech slurred? Was it rapid? Was it

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slow?

Q. And do drunks sometimes talk about some pretty odd things?

A. Yes.

Q. And you testify as to that?

A. Yes.

Q. Now, turning to this report of investigation. What time did you first radio to communications that you were stopping the vehicle?

A. Looking at the report, it says I stopped him at 1920, which would be 7:20 p.m.

Q. Do you have any reason to doubt the veracity of your report?

A. No.

Q. Do you generally try and do a good job putting these reports together?

A. Yes.

Q. You put as many of the essential facts as you can in the report.

A. Correct.

Q. Are you – do these often come up in criminal cases?

A. Yes.

Q. And you're cross-examined, I presume, on the contents of your reports.

A. Yes.

Q. Do you receive training on these at the police academy?

A. As, yeah, its content, what you need to put in there, yes,

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A. I don't recall him ever saying that he did.

Q. Okay. Direct your attention to page 3, request for admission 6. Now, in response to the question, "Admit or deny that Plaintiff Alford stated that he had a copy of the statute and relevant case in his glove box," what was the answer given?

A. It's "Admit".

Q. Okay. When did you first come into the Washington State Patrol?

A. October 1991.

Q. Are you're familiar with the Law Enforcement Digest?

A. Yes, I am.

Q. How often does that come out?

A. Monthly.

Q. Do you generally read it?

A. Generally.

Q. Do you at least try and take time to scan the table of contents?

A. Yes.

Q. See if there's anything of interest?

A. Yes.

Q. Do you recall anything in the Law Enforcement Digest about this case that Mr. Alford was citing to?

A. No, I do not.

Q. Do you think looking at a copy of it might refresh your recollection on this?

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A. It could.

Q. Okay.

Now that you've had an opportunity to look at this, was there ever anything in the Law Enforcement Digest about this case?

A. Apparently there was, but I don't remember seeing the Law Enforcement Digest.

Q. Hmm. And what was the date on that, that it came out?

A. I didn't look specifically at that date.

Q. Would you like to see it again?

A. Sure.

Q. Okay.

MR. MENTZER: Your Honor, I'm going to object to this. I don't see where this item has been identified as an exhibit for the plaintiff using. I guess it's one thing for him to refresh his recollection, but that's not the question before the witness. He could have him testify.

THE COURT: That's a fair objection, counsel.

Q. (By Mr. Phillips) Now that you've looked at this, have you refreshed your recollection as to whether and when this was reported in the Law Enforcement Digest?

A. Yes.

Q. When was it reported?

A. July of 1993.

Q. How long was that before Mr. Alford's arrest?

* * *

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A. Not that I recall, no.

Q. Hmmm. Really?

Would it perhaps refresh your recollection to see the policy memo put out by Chief Sandberg?

A. Oh. Before, yes, there was nothing. Afterwards, yes, there has been one put out afterwards.

Q. Oh. What is that?

MR. MENTZER: Objection to the relevancy of the policies of the State Patrol afterwards.

THE COURT: Sustained.

Q. (By Mr. Phillips) So you handcuffed him.

A. Correct.

Q. You mirandized him.

A. Correct.

Q. You frisked him.

A. Correct.

Q. You frisked him.

A. Correct.

Q. And you still maintain that you felt that it was both reasonable and prudent, given what you knew at that time, to arrest him for violating your right to privacy?

A. Correct.

Q. You maintain that to this day?

A. Well, since the arrest we've been given the case statute, and the way it's read, apparently he can do it. But at the time. I felt that everything was correct.

Q. Okay. Fair enough.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
[Caption Omitted in Printing]
EXCERPTS OF TRANSCRIPT OF TRIAL
Thursday, January 4, 2001

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* * *

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DIRECT EXAMINATION

BY MR. MENTZER:

Q. Please state your name for the record, please.

A. Gerald "Gerry" Devenpeck.

Q. And are you employed, Mr. Devenpeck?

A. Yes, I am.

Q. How are you employed?

A. I'm an airline transport pilot with AC Aviation Services of Nashua, New Hampshire.

Q. Have you ever been employed with Washington State Patrol?

A. Yes, I was, for 21 years.

Q. When did you leave the Washington State Patrol?

A. The 31st of December, 1999.

Q. Why?

A. To pursue a career as a pilot.

Q. In what capacity were you employed with the Washington State Patrol?

A. The 5th of March, 1979, I was hired as a patrol cadet assigned to executive protection at the mansion in Olympia, and the 23rd of March of 1980 I was selected to attend the 58th State Patrol Academy class in Shelton, and I graduated on the 30th of June of 1980 and was commissioned a state trooper. On the 13th of July of 1990 I was promoted to the position of sergeant.

Q. 1990?

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A. That's correct.

Q. And what were your duties as a sergeant?

A. I was a detachment supervisor.

Q. Okay. What does that mean?

A. A detachment supervisor runs the day-to-day operations of the detachment. Depending on where you are located, you have different responsibilities. Sometimes you have responsibilities for the office as a whole, and sometimes just a detachment that works out of a district office. I wouldn't want to say it's easier if you're in a district office, but you don't have the responsibilities of the facility and a secretary and the other things. You just basically have the troopers. And it's the supervisor's job to ensure that the troopers fulfill their responsibilities, traffic law enforcement and the other responsibilities that they have.

Q. How did you do that, make sure that the troopers fulfilled their responsibilities?

BEST AVAILABLE COPY

A. Periodically ride with them, evaluate their reports, and different avenues like that. And counsel them and talk to them and see how they are doing.

Q. How did you see your job as far as oversight of the troopers?

A. I don't know that I understand.

Q. Well, I will skip that for now.

Was Joi Haner under your supervision?

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A. Yes, he was.

Q. When was that?

A. I think it was '96, but I'm not sure.

Q. Okay.

A. I remember the first day I rode with him when he came down, I showed him our area of responsibility and basically explained to him what my expectations were and gave him what we called an interoffice communication showing those expectations.

Q. What training did you receive with respect to your duties? As a trooper, first.

A. As I indicated, I attended the 58th Patrol Academy Class in 1980. In – in August of '90 – or excuse me – of '85 I was selected as a detective in the narcotics section, and at some point after that – well, right after that I attended the drug enforcement class put on by the Drug Enforcement Administration in Seattle and then

a State Patrol basic detectives class. Both those were two-week courses. That would have been, I think, in – I know the DEA was '85, and I think the detectives school was also in '85.

Q. Did you receive any special training relating to being a sergeant?

A. Yes, I did. That would have been in 1990, but I'm not sure of the month.

Q. Okay. As a sergeant, were you ever called out to assist troopers?

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Q. Okay. So what did you do when you contacted Mr. Alford?

A. I advised him of the information that I had been given and talked to him about the wig-wag headlights.

Q. Okay. And what did he tell you about the wig-wag headlights?

A. He started to tell me that they were legal because he had them in Kitsap County and the Kitsap County Sheriff had apologized to him and sent him a letter and that the ACLU said he could use them as long as he wasn't impersonating.

Q. What was your reaction to that?

A. I knew that he could not use them unless he had received permission from the State Patrol Equipment Standard Review section that specifically said that he could.

Q. And was it your understanding at that time that wig-wag headlights were approved for people who were volunteering for emergency management services or other kinds of things like that?

A. Wig-wag headlights are not approved for that. Green, solid green lights are approved for volunteer firefighters as long as they are solid green and mounted in a specific location. They do not give the volunteer firefighters any emergency vehicle authorization, only identification, so that when they are parked at the scene of a fire, other people will know that they are volunteer firefighters.

Q. Okay. So what did you – what did you do after Trooper

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Haner informed you that Kitsap County told him it was okay for him to have the headlights?

A. After Mr. Alford told me?

Q. Yes.

A. I continued to explain to him that it wasn't proper, and at that time I believe he pulled out an RCW book and started to show me, or handed it to me, and said that in here it's okay. And I turned to the section and pointed to him and asked him to read it and said, "It says right there that you can't have them."

Q. Okay. How did you know it wasn't okay if Kitsap County told him it was?

A. Oftentimes –

MR. PHILLIPS: Objection. It's been asked and answered. He already said this.

THE COURT: He may answer.

A. Oftentimes when you contact violators, especially, as I indicated, the State Patrol is involved in traffic law enforcement. Local police departments and sheriff's offices have specialized units which do a very similar job to what the State Patrol does, and they receive extra training on traffic laws, like we do. And you could run into a police officer that could tell you, take for example a monster truck kind of a thing. You see these pickups that are raised real high. Now, a police officer that doesn't deal with traffic law enforcement

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could very well tell someone that, yeah, that's legal, it's okay. Whereas someone who is involved in traffic law enforcement on a regular basis would say, no, if the vehicle is licensed for 6,000 pounds it can be 28 inches, if it's licensed for 8,000 pounds, the bumper can be 30 inches high. But somebody that's not involved in that wouldn't know that. It's not something you would know.

It's like if being a traffic law enforcement officer you went to a burglary, you would be kind of lost. Eventually, if you didn't ruin all the evidence while you were muddling through the scene, you could probably figure it out, because a crime, whether it be a serious traffic accident or a burglary, there's going to be evidence to the crime. Like I say, if you don't destroy the evidence

while you're trying to figure out how to find it, you could eventually figure it out, but you would have a lot of trouble. It would be kind like a brain surgeon trying to do heart surgery. They are a trained surgeon, they are just working on a different area and aren't familiar with it.

And I'm not trying to equate a trooper with a brain surgeon, don't get me wrong.

Q. So what happened next after Trooper – or excuse me – Mr. Alford informed you that he thought it was okay and you read the statute?

A. I asked Mr. Alford to step out – to raise the hood and step out of the vehicle so that I could see a flashing – flasher

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unit like the patrol cars have and – patrol cars, they are mounted on the fender wheel. They are very obvious, they are about that size (indicating) of a flasher unit. Naturally, because of the – I'm not an electrician, but because of the voltage or wattage, or whatever it is, of the lights, they need to be a large flasher unit. It's kind of like when you hook a trailer to your car, you have to get a bigger flasher unit so that the turn signals will work because the standard one on the car, that they won't work properly. So this is a big flasher because the headlights draw lots of current. And I thought maybe I would be able to see that up there. And if I would have seen it, basically what I would have had him do is disconnect them. But I wasn't able to locate the flasher unit.

Q. And then what?

A. He got back in the car – we closed the hood, he got back in the car, and continued to tell me about this alarm system. And throughout the course of this, I felt that Mr. Alford wasn't being truthful with me and continued kind of talking in circles and making statements that I just didn't think were true. I've seen several different kind of alarm systems, and when you hit the button, an alarm will chirp or beep or honk the horn, and the parking lights, and sometimes the headlights, will make a couple of quick flashes together, and that's how they operate. What he was trying to tell me, that that's what happened when he was parked with the people, and I just wasn't believing what he

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was telling me.

So I continued to question him about the alarm and asked him to show me in the instruction manual where it would say that that's what would happen when you activated the alarm.

Q. Let me step to something else real quick. What are wig-wag headlights?

A. Wig-wag headlights, there's a switch that activates them, and one light will flash, the other – and it will go off. The other light will come on, and it's just kind of like a blink-blink-blink-blink-blink because it draws people's attention. Overhead lights on a patrol car sometimes are above actually the rearview mirror of a car, and the wig-wag headlights actually show into the

back of the car very well and draw attention a lot better and actually can be seen from farther away in the daytime.

Q. Now, is that something different than what you have seen on alarm systems?

A. Oh, absolutely.

Q. How so?

A. Like I say, the alarm systems, either the parking lights and/or the headlights will come on, they will all flash, like this (indicating), and then go off.

Q. Okay. You mentioned that you asked Mr. Alford to find the manual for the alarm system.

A. Yes, I did.

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Q. What happened then?

A. Mr. Alford removed the box for the alarm system from the back seat and brought it up to the front seat and took the manual out and started to thumb through it.

Q. Okay. And then what happened?

A. He subsequently moved the box that was on the seat, and when he moved the box, it dislodged the jacket and I saw something shiny and black on the seat. This naturally aroused my suspicion and caused me concern. As I indicated earlier, that it was possible there could be a weapon. Many, many weapons are shiny and black, so it naturally got my full attention, and I looked at it, and as I was standing – if this was the door, I was

standing right outside the door and I could look down and see then that it was a tape recorder and the play and record buttons were both pushed. I lifted up the jacket and saw that it was moving, and then I advised him that he was under arrest, and I asked Trooper Haner to remove him from the car.

Q. What did that mean to you, that the play and record buttons were both pushed down?

A. That the tape recorder was in operation and actually recording at the time.

Q. And what's wrong with that?

A. I felt that it was a violation of the recording law, which is RCW 9.73.030, where it says in order to intercept or record a conversation either an individual –

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MR. PHILLIPS: I will have to object. That's misstating the statute. The statute says private conversation.

THE COURT: The objection is sustained.

Q. (By Mr. Mentzer) What was your understanding of the Privacy Act at the time?

A. That unless the person doing the recording, because Washington requires two-party consent for a recording, unless the person divulges that their conversation is being recorded and that statement is on the tape, you cannot record the conversation without your consent or knowledge.

Q. And why did you care that you were being recorded?

A. It was a violation of the statute and it's a gross misdemeanor.

Q. What would you have done had the recorder been out in the open?

A. If the recorder would have been in the open and I could have plainly seen it, even if he wouldn't have made an announcement, I would have felt that the recorder being there and in operation would have been enough of an announcement even though it didn't completely comply with the statute.

Q. Do you have a problem with citizens recording your conversations at stops?

A. Absolutely not.

Q. Would you have behaved any differently had you known you

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were being recorded?

A. Absolutely not.

Q. What did you do after you announced that Mr. Alford was under arrest?

A. I don't recall if I opened the door or reached through the window, but I removed the tape recorder from the car.

Q. When you told Mr. Alford that he was under arrest, did you believe that you had probable cause?

A. Absolutely. I felt that he was in direct violation of the statute.

Q. And that was based on what?

A. My knowledge of the statute. As I indicated, when I was a detective in narcotics, this was something that we had to deal with because of the one-party consent, and officers working undercover, unless we had a court order, we weren't able to do this type of recording.

Q. Had you had any experience with the Privacy Act prior to Mr. Alford's arrest?

A. Yes, I had.

Q. How so?

A. The State Patrol district office in Tacoma had been recently built, and during that time the captain, because of some language barriers and use of the language bank, elected to have the phone in the Breathalyzer room go through communications so it could be recorded so that the language bank calls, if they

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were made, could be used by the defendant in court. And that's how I knew. Subsequently it was found that these calls could not be recorded because nobody told the defendants that they were being recorded.

Q. Have you had any personal experience with the Privacy Act?

A. Yes, I have.

Q. How so?

A. I had a telephone conversation that was recorded by someone else illegally.

Q. By who else?

A. His name was Jim O'Neill.

Q. And is he a trooper?

A. Yes, he is.

Q. And what was the result of that?

A. It was determined that the phone call could not be recorded, and the recording was destroyed.

Q. Okay. And what was the context of your recording that? Was it on duty, off duty?

A. I actually was on duty. It involved a situation where this subject had filed a complaint with the Fair Labor Standards Act because in the patrol at the time, if a trooper wanted to work six days in one week and four days in the next week so he could have three days off in a row, the detachment supervisor was able to do that, and it worked out pretty well for everybody involved. It wasn't something that a supervisor could initiate,

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but the trooper could so initiate it.

Well, he complained that this was happening and that the employees weren't getting paid overtime for their sixth day in the week, even though it was their request to work it. Well, I had a trooper, after this happened, a couple months later, ask to do this, and I said, you can't do that any longer because Jim O'Neill filed a complaint about that happening throughout the patrol.

Q. Okay. I asked you what you believed your probable cause to be when you arrested Mr. Alford, and I think I interrupted. Had you finished describing what that was?

A. I don't recall whether I finished or not. But the probable cause, which is facts and circumstances that would lead a reasonable and prudent person to believe that a crime has been or is being committed, is what probable cause is, and when I saw the recorder in the record mode and saw that it was moving, I felt that I had probable cause to arrest Mr. Alford in violation of the statute – as he was in violation of the statute.

Q. Okay. Was that based on anything other than that?

A. The prior training and knowledge of the statute.

Q. Okay. What did you do after Trooper Haner removed Mr. Alford from the vehicle?

A. As he was removing him from the vehicle, I said to Trooper Haner to kind of, for emphasis – I knew he would do it, but for a little added emphasis – "Pat him down." So that it would

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kind of spark his attention that I wanted him to be checked very, very carefully. Sometimes you get into a habit of you just kind of pat them down because you think it's okay, and almost always it is. But I wanted him to make sure that he made sure that he didn't have any weapons.

Q. Why did you think that the situation called for extra emphasis?

A. Just as an officer safety thing to protect ourselves so that we didn't get hurt.

Q. Okay. Then what happened?

A. As Trooper Haner and Mr. Alford were walking to the back of the car, I was retrieving the recorder and played it back, and I could hear Mr. Alford saying something but I didn't hear exactly what he said. I then walked to the rear of the vehicle and again told him that he was under arrest for violation of the statute. Making an illegal tape recording.

Q. Excuse me?

A. Making an illegal tape recording.

Q. Why did you tell him again?

A. In order for someone to be under arrest, they have to understand that they are under arrest, otherwise the arrest is not complete. You have to inform them and be sure that they understand that they are under arrest.

Q. Were you feeling any animosity toward Mr. Alford?

A. Absolutely not. I had never seen him before and didn't know

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anything about him.

Q. What happened when you were behind the car with Mr. Alford and Trooper Haner?

A. At some point Trooper Haner handcuffed him, and then I went back up to the vehicle to search the vehicle.

Q. Did you hear Mr. Alford make any statements regarding the legality of the recording?

A. He said something to the effect that it was legal for him to do it.

Q. Did you hear him say anything about a case?

A. I did not specifically hear him say something about a case. As he was walking to the back, I heard him saying something.

Q. What do you mean "something"?

A. I could hear that he was saying something to Trooper Haner, but as the traffic was going by and I was on the other side of the car, I didn't hear exactly what he said.

Q. You filed a report of investigation in this case, is that right?

A. Yes, I did.

MR. MENTZER: Your Honor, may I approach the witness?

Q. (By Mr. Mentzer) I'm handing you what's been marked, but I don't believe has yet been admitted, as Plaintiff's Exhibit No. 5. Do you recognize that document?

A. Yes, I do.

Q. I would like to refer you to the last page, page 3.

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A. Page 2, basically –

Q. Page 2, excuse me. The last page.

A. Okay.

Q. Now, looking in your narrative there, you mention State of Washington v. Florez, is that right?

A. Yes, I did.

Q. Now, you just told us that you didn't hear him say anything about a case.

A. That's correct.

Q. Why is that in your report?

A. I knew that he was saying something, and I didn't know exactly what it was, so I completed this report the next day because that night I had to go to a serious accident. Trooper Haner was at the jail. I was the only one out working at the time, so in the south part of our county I had to go to this accident, so I didn't write my report that night. I wrote it the next day at 2:55 p.m. As I was typing my report, I remember Mr. Alford saying something as he was going to the back of the car, and I looked at Trooper Haner's report to see exactly what he had said. And in my report I indicate that Alford said something to the effect that it was not illegal because of State of Washington v. Florez.

Q. And you received that information from where?

A. Trooper Haner's report, the name of what he said.

Q. If you didn't hear it, why did you put it in your report?

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A. If Mr. Alford had said it, this report is not only for my information, it is so Mr. Alford could put on an affirmative defense. And prior to someone going to court, they have what's called discovery, where all parties have access to the information. Therefore, in order for Mr. Alford's attorney, if he had one, to put on an affirmative defense, he would need information like that. This is a report to bring forward facts and information that you acquire, not just facts that you think can convict a person.

Q. Do you see it as your job to help the defendant?

A. Absolutely.

Q. How so?

A. As I say, our job is to collect the facts. If we have reason to believe that someone has committed a crime in violation of the laws of the state, that person is arrested or issued a ticket, or whichever it may be, but you need to bring forward the facts. If you stop someone for speeding and they say their speedometer doesn't work, that's an important fact that you would want to allow the person that hears the case that information. So if I was doing 65 in a 55 or 68, or whatever it might be, and the person said, my speedometer doesn't work, I didn't have any other cars to follow so that I could judge my speed, that would be an important fact that you would want to include.

Q. What did you do after Trooper Haner had handcuffed Mr.

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Alford?

A. As I indicated, I went back up to the car and started searching the vehicle incident to arrest.

Q. What were you looking for?

A. I wanted to find the activation for the wig-wag headlights and also wanted to make sure there were no weapons in the car.

Q. Did you find an activation for the wig-wag headlights?

A. Yes, I did. It was located just right by the steering column on the bottom of the dash. It was, as I recall, a white or beige rocker-type switch.

Q. And did you try that switch?

A. Yes, I did. I turned the switch on, and I could see through the front of the vehicle through the windshield that the headlights were flashing in an alternating manner.

Q. Was Trooper Haner present at that point?

A. He subsequently arrived back up after he had placed Mr. Alford in his car.

Q. Okay. And what did you do next?

A. I continued checking the contents of the vehicle, including the glove compartment in the back seat. I was familiar with a situation several years ago where a trooper had inventoried – because of a friend of mine who owns a tow company – a trooper had inventoried a car and had actually missed a large amount of cash in the glove box,

and the next day the person went to the tow company and said, "I would like to have my money out of the

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glove box." And my friend, the tow company owner, looked at the inventory sheet and said, "Sir, there's no money in the car." And naturally, you know, these two people are going, hold it a second. The tow company operating is saying, well, this guy is saying there's money in the car, I have no reason to disbelieve him. The inventory sheet doesn't show any money in the car. And so they went out and looked in the car, and in an envelope in the glove box there was a large amount of cash. The trooper hadn't seen it. If somebody had broken into the impound lot, which happens a great deal, and had found it in the car, the money would have been gone, and naturally the trooper would have been suspect or the tow driver.

Q. So how does that matter to the search here?

A. I think it's important that you look to make sure that there's nothing of value in a vehicle while you're inventorying it. It not only protects the person whose car it is, it protects me and it protects the tow operator.

Q. Okay. Were you looking at the paperwork inside the vehicle?

A. I looked at the paperwork inside the vehicle, yes.

Q. Did you find a case?

A. I did not find a case. I did see, again, his RCW book.

Q. Okay. You had looked at that prior, is that right?

A. Yes, I had. It was a miniaturized – the print wasn't miniature, but, I mean, it was basically an abridged version of

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the Revised Code of Washington Motor Code.

Q. The motor code?

A. Yes.

Q. What does that mean?

A. That's the laws that relate to the operation of vehicles in the state.

Q. Were the laws relating to the Privacy Act contained in that, that volume?

A. I don't believe they were.

Q. Okay.

A. That was Title 9, which is a separate section. I didn't search the book to see if they were in there, but I don't believe they were. I think it was just the motor code.

Q. Did you have Title 9 available to you at the scene.

A. Yes, I did.

Q. Did you look at it?

A. Yes, I did.

Q. Why did you look at it?

A. Just to make sure that I read the law properly, remembered the law properly as it related to making the recording.

Q. Did you make any telephone calls from the scene?

A. Yes, I did.

Q. Who did you call?

A. Initially I called the Kitsap County Sheriff's Department because Mr. Alford had made statements that, at least what I

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thought were about wig-wag headlights, saying that he was told up there that he could use them and that it was okay. So I attempted to contact someone up there and find out if they knew anything about him being told that he could use them.

Q. What did you learn there?

A. I talked to a sergeant who was at their Silverdale office and was told that he didn't know anything about a Mr. Alford.

Q. Okay. Well, you mentioned earlier that you were certain that the wig-wag headlights were not lawful. Why did you call Kitsap County?

A. To see if someone there knew that he – like I indicated before – that he had been told that it was okay to do that. I just wanted to make sure, if I could, at that time find out if someone had told him that he could.

Q. What difference would that make?

A. Well, it's kind of a bad thing if you get bad advice. But I truly felt in this situation that he had wig-wag headlights for a different reason than Department of Emergency Management.

Q. Did you make any other telephone calls?

A. Yes, I did.

Q. To whom?

A. I called a trooper who I felt would have the phone number for the deputy prosecutor that worked in the Pierce County District Court 2 in Gig Harbor.

Q. Did you not have that number yourself?

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A. I did not at the time.

Q. What do you mean at the time?

A. I made the phone call and got the phone number.

Q. And did you call that phone number?

A. Yes, I did.

Q. Who was the prosecutor you were trying to reach?

A. It was Deputy Prosecutor Mark Lindquist.

Q. Was he the on-call prosecutor?

A. I didn't have the on-call prosecutor list in my patrol car, but he was the prosecutor that we dealt with that would be handling this case.

Q. Okay. Did you call Mr. Lindquist?

A. Yes, I did.

Q. And what did you learn there?

A. I got an answering machine.

Q. Okay. And this is while Mr. Alford is still at the scene?

A. Yes, he was.

Q. Okay. Did you ever talk to Mr. Lindquist?

A. I subsequently did. I tried calling him back a few minutes later, and I got an answer.

Q. Okay. And where was Mr. Alford when you talked to Mr. Lindquist?

A. He was on his way to the Pierce County Jail. I had made the decision after reviewing the law again that, yes, in fact he had violated the law and felt that I was on firm footing as far as

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the arrest.

Q. Okay. Now, when you say "the law," what law did you mean?

A. The statute for tape-recording.

Q. And you believed that he had violated that, is that what you said?

A. That's correct.

Q. So what was the substance of your conversation with Mr. Lindquist?

A. I basically summarized the facts of the case and how I saw the tape recorder and read him the law. He probably didn't – at home, probably didn't have the statutes in front of him, so I read him the law.

Q. Okay. Now, did you mention to Mr. Lindquist that Mr. Alford had said something about the State of Washington v. Florez?

A. No, I did not.

Q. Why?

A. As I indicated, at the time I hadn't heard him actually say those words, but I told him that the defendant had said that it was okay to record. And then I, like I said, I read the statute to the deputy prosecutor.

Q. Do you ever encounter defendants saying what they are doing is lawful?

A. Very often.

Q. How so?

A. Well, as I indicated about the equipment type of things,

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they – oftentimes people think they are not violating the law. About at least every other drunk driver you arrest say they are not violating the law, that they are not affected, in that type of situation.

Q. Do they ever try to cite you to authority?

A. They will usually say that I know it's okay or I read that it was okay or my lawyer said it was okay.

Q. And what do you do with that information?

A. It would depend. If it was something you dealt with on a regular basis and knew exactly what it

was, you would say, well, yeah, I've heard that before, but if it's something you are not familiar with and don't do every day, you would want to make sure you're on firm ground.

Q. How do you do that?

A. By consulting with your local prosecutor.

Q. And in this case, that was Mark Lindquist, is that right?

A. That's correct.

Q. Okay. So what was – what happened after you read Mr. Lindquist the statute?

A. He said that he felt that it was a good arrest and that he was in direct violation of the law.

Q. What if he had told you it wasn't a good arrest? Mr. Alford is already on his way to jail, right?

A. I would have got on the horn and told Trooper Haner to bring him back, and we would have taken him to his car.

* * *

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rules and regulations of the State Patrol.

Q. Do you review troopers – with respect to your supervisory responsibilities, do you review trooper's determinations of probable cause?

A. At the end of every month, the troopers submit all their case reports and all their monthly documentation to the supervisor for review. I closely reviewed their case reports to make sure they were complete and well-written and

contained the facts and circumstances that were appropriate to the incident.

Q. After you had your telephone conversation with Mark Lindquist, what did you do?

A. I called Trooper Haner on the radio and told him that I had spoken with the prosecutor and that he agreed that the arrest was a good, valid arrest.

Q. Did you discuss any other matters on the telephone with Mr. Lindquist?

A. I don't recall specifically.

Q. Any matters relating – any other matters than the Privacy Act, is what I mean. Other possible charges.

A. As I recall, Mr. Lindquist said, "Well, it sounds like, based on the runaround the guy gave you, that you should charge him with obstructing." There's a statute for obstructing a public servant, which I can't quote the statute exactly, but if someone delays your investigation based on them not giving you proper information, that that's against the law.

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Now, a defendant doesn't have to make a statement, but if they are making statements to you that cause you to basically chase your tail, that's illegal, according to the statute. And he brought that up, and I said the State Patrol doesn't stack charges, which they don't.

Q. What does that mean?

A. That if you arrest someone for one reason, if there are other types of things – like I will resort back to a drunk driving case. If you stop and alcohol-impaired driver for excessive speed, you don't write the person a speeding ticket. Or if they run a stop sign and that's why you stopped them and you see that they are intoxicated, you don't normally write them a ticket for the stop sign violation.

Q. Have you ever arrested somebody for one crime and they've been charged with a different one later?

MR. PHILLIPS: Object to relevance on this.

THE COURT: Sustained.

Q. (By Mr. Mentzer) Why did you call Mark Lindquist instead of the on-call prosecutor?

A. Mr. Lindquist was the prosecutor that worked at the district court in Gig Harbor, which was the court that we worked out of. I had worked with him on several prior cases, and in my, at that time – what, 18 or 19 years? – 18 or 19 years of experience at that time, he was the best prosecutor that I had ever worked with, and I have worked with many, many prosecutors.

* * *

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Q. (By Mr. Phillips) Why did you leave the State Patrol then?

A. I'm an airline transport pilot, and I pursued to become a paid pilot, not a private pilot.

Q. It didn't have anything to do with the reprimand you received?

MR. MENTZER: Objection, Your Honor.

THE COURT: Sustained.

A. Absolutely not.

THE COURT: Disregard that answer. I sustained the objection.

Q. (By Mr. Phillips) Now, how many arrests have you made over the years, if you could give us an approximation?

A. I couldn't even give an approximation that would be close.

Q. Hundreds?

A. Yes, hundreds.

Q. How many times have you testified?

A. Not hundreds, but several.

Q. Dozens?

A. Dozens would be a fair assessment.

Q. Now, you were talking earlier about the Privacy Act, and isn't it actually correct that the Privacy Act prohibits recording a private conversation?

A. Yes, the statute says a private conversation.

Q. It doesn't prohibit reporting any conversation, but a private conversation.

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A. I would have to review the statute.

Q. Well, you just said, you just agreed that it's a private conversation.

A. It does say that, but I don't know if it says other additional conversations.

Q. Did you review the statute at that time?

A. Yes.

Q. Was the phrase "private conversation" in there that night?

A. Yes, sir, it was.

Q. Now, do you still have a copy of Plaintiff's Exhibit 5 in front of you, your report of investigation?

A. Yes, I do.

Q. Now –

THE COURT: Wait a minute. It's not in evidence, counsel.

MR. PHILLIPS: I will place Exhibit 5 into evidence.

MR. MENTZER: No objection. I'm wondering, though, if I could retrieve my copy from the defendant and have the –

THE COURT: Sure.

MR. MENTZER: -- defendant's copy.

THE COURT: Exhibit 5 may be admitted.

(Exhibit No. 5 was admitted.)

Q. (By Mr. Phillips) Now, on the first page, you will notice where I've highlighted. Is that your signature?

A. Yes.

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Q. What is the certification above that?

A. "I certify (declare) under penalty of perjury under the laws of the State of Washington that the attached reports are true, correct, and accurate."

Q. Let's turn to the first narrative. You see the first section that I have highlighted. You identify there that Trooper Haner told you that the subject had left.

A. Yes.

Q. Okay. Then you say, "He also said." When you say "he," who are you referring to?

A. Trooper Haner.

Q. Okay. And then, "Haner said the subject could not get," and Haner said, that's what Haner told you?

A. Correct.

Q. You're relating there what Trooper Haner told you.

A. Yes.

Q. Now, in the next paragraph, you say that "I checked the RCW." You did that yourself, you checked the RCW?

A. Yes.

Q. You didn't have Haner do it –

A. No.

Q. – you did it?

A. I did it.

Q. Because if you had Haner do it, you would have written in the report, "I had Haner check the RCW."

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A. Or that the RCW was checked.

Q. Now, in this paragraph, can you tell me in there, is there anything that Mr. Alford refused to do?

A. He refused to turn his wig-wag headlights on with the switch that I subsequently found.

Q. Did you ask him – did you see the switch?

A. I did not see the switch.

Q. Did you ask him if there were any switches?

A. I did not ask him, but had asked him to turn the wig-wag headlights on.

Q. Did he punch every button that you asked him to punch?

A. I didn't ask him to punch a specific button. As I recall, he was manipulating like a key fob alarm-type thing.

Q. Have you ever had a car alarm?

A. Yes.

Q. Do you activate it with a key fob alarm-type thing?

A. Yes. In fact, I've had two car alarms.

Q. Okay.

A. Both of them were with the key activated.

Q. Did he pull out the operator's manual?

A. Yes, he did.

Q. Did he show it to you?

A. I don't remember that he specifically showed it to me, but I specifically remember him going through it.

Q. Did he try and hide it from you?

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A. No, sir, he didn't.

Q. Did he open the hood when you asked him to?

A. Yes, he did.

Q. Did he object at all to looking around under the hood?

A. No, he didn't.

Q. Now, on the last page, you talk about his intent to clandestinely record the conversation. You stated on direct examination that what really got you was the fact that you felt he was trying to hide the tape recorder, is that right?

A. That's why I said clandestinely.

Q. But what really made you arrest him was the fact that you felt that it was being hidden from you, right?

A. He was clandestinely recording the conversation.

Q. Okay, now answer the question. What made you arrest him was the fact that he had it hidden, not the fact that he was recording, isn't that right?

A. That's correct.

Q. So you –

A. That's why I said clandestinely.

Q. So you were irritated that you thought he was trying to hide the recording.

A. I wasn't irritated at all.

Q. But if he had it out in the open, you said you wouldn't have arrested him.

A. Just because you arrest somebody doesn't mean you're

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irritated with him. He didn't violate me, he violated the statute to the State of Washington. Just like the speeder violates the law –

MR. PHILLIPS: I will object as nonresponsive.

THE COURT: Sustained. Go ahead.

Q. (By Mr. Phillips) Now, actually, the charge was dismissed, wasn't it?

A. Yes, it was.

Q. So he didn't violate the statutes of the law of Washington, did he?

A. In my opinion, he did.

Q. So it's still your opinion that he violated those statutes?

A. At the time that the case was dismissed, it was clearly my opinion that he had violated the statute. There was a new prosecutor that wasn't

familiar with the case that subsequently dismissed it.

Q. Well, would you like me to bring out the exhibit where it was actually dismissed by the court and not by the prosecutor?

A. Please.

MR. PHILLIPS: It's Exhibit 3, I believe.

Q. (By Mr. Phillips) Look at page 2 of that where it says "Court Order."

THE COURT: Exhibit number?

MR. PHILLIPS: Exhibit No. 3.

A. Page 1 says "Court Order."

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Q. (By Mr. Phillips) And the second page also.

A. Okay.

Q. Now, can you tell me on there where it says that it was dismissed by a prosecutor?

A. The prosecutor would have, along with the defense, after they had a consultation, agreed to have the charge dismissed. But in order for that to happen, the judge would dismiss it.

Q. Oh, okay. So a minute ago the prosecutor dismissed it, but now that you see the court order, the judge dismissed it, is that right?

A. No, sir.

Q. Okay.

A. The judge ultimately would dismiss it.

Q. Do you know how many hearings they had in this case?

A. No, I do not.

Q. You're not aware that this actually went to a contested hearing?

A. It wouldn't go to a contested hearing because it's a criminal matter. An infraction, the wig-wag headlights, would go to a contested hearing. The criminal matter of the recording would go to a trial before a judge or a judge and a jury.

Q. Who was the victim in this case?

A. Basically, the State of Washington.

Q. No, who were the victims in this case?

A. Who was illegally recorded?

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Q. No. No one was illegally recorded. Who were listed as victims in this case?

A. Myself and Trooper Haner.

Q. And you felt victimized?

A. I didn't feel victimized, but I felt we were the subjects that were violated.

Q. So your rights were violated by him clandestinely recording you.

A. I felt that he had violated the statute that prohibited that.

Q. Now, you testified that you've pulled over drunks before.

A. Yes, sir.

Q. And what sort of things, as with Officer Haner, what sorts of things go into establishing probable cause to arrest a drunk driver?

A. Facts and circumstances that would lead a reasonable and prudent person to believe that a crime had been or was being committed.

Q. What sort of facts would those entail?

A. The precontact driving, whether they were weaving, speeding. It actually can be something as small as a taillight violation that you contact a person for.

Q. Now, Trooper Haner mentioned slurred speech. Is that another indicator that's used?

A. It can be, but when I would indicate that, I would say I

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felt the person's speech was slurred. However, I had never spoke to the person before. But I think we've all probably heard people who have had too much to drink and you can detect a slur in their speech that's not what would be a normal speech impediment.

Q. And what's the punishment for drunk driving, do you know?

A. Not right off the top of my head.

Q. Is there a standard punishment for gross misdemeanors?

A. I think there's a penalty range, but I'm not sure exactly what it is. In the code book it's – which is the RCW code book – it specifically says some

things about driving under the influence and lists them out, but they are not always followed. As far as I know.

Q. Is there a possibility of jail time for a gross misdemeanor?

A. Yes, sir, there is.

Q. Significant jail time?

A. Yes, sir, there is.

Q. A year?

A. As I recall, I think a gross misdemeanor is up to one year in the county jail. I would have to look, but I believe it's up to one year in the county jail, and not to exceed one year.

Q. Now, you were the supervisor on the scene.

A. Yes.

Q. You were in charge.

A. Yes.

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Q. What you said went.

A. Basically.

Q. So when you told Trooper Haner, "Put him under arrest," that was what was going to happen.

A. If Trooper Haner, as he testified, felt that what I was saying wasn't proper, he would have kick [sic] me in the shin and said, "Hold it a second. I think we should talk about this."

Q. What time was Mr. Alford placed into custody?

A. At approximately 8:10.

Q. Now, turning back to Exhibit 5 here.

A. Which one is it? Okay.

Q. That's your report of investigation. You say, you wrote in your report, "Alford said something to the effect that it was not illegal because of State of Washington v. Florez. He went on to say that it was not in violation of 9.73.030. I advised him that it was a violation of subsection 3 and that he had not made an announcement or obtained my permission."

Is that an accurate rendition of what happened that night?

A. He didn't recite the statute. He basically said it wasn't against the law.

Q. Okay.

A. You can see I don't have it in quotes there, "He went on to say."

Q. And Florez, Flora, Flores, whatever the name of the case was, wasn't exactly clear.

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A. I didn't hear him say it, no.

Q. You didn't [sic] him say anything?

A. I heard him talking to Trooper Haner as he was walking to the back of the vehicle, and I knew he was saying something, but I couldn't hear exactly what he was saying.

Q. But you put it in your report anyway.

A. Yes, I did.

Q. Out of solicitude for his possible defense attorney.

A. Because I knew he had said something, but I wasn't sure what he had said.

Q. You didn't think it was worth while to check up and see what he had said before you arrested him, before you transported him to jail?

A. I had arrested him at that point, and I didn't know exactly what he had said. I heard what he said while I was at the rear of the car, and I felt based on what I knew about the statute, that he was in violation of the law.

Q. Because you felt that this was a private conversation?

A. Yes, I did.

Q. Even though it's the type of conversation that you come into court and testify about.

A. At – at the defendants' request, yes.

Q. Oh, you've never come in and testified at the prosecution's request?

A. Any trial that I've ever testified at would have been at the

* * *

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arrest?

A. I think I indicated approximately 8:10. We could probably go back and find a little bit closer if we listen to the tape and heard the radio transmissions off of Mr. Alford's radio, when they would give the time, and then we could maybe get a correlation as to when you hear me say on the tape that you're under arrest.

Q. But you reckon it's around 8:10?

A. You know, you arrest somebody, you look at your watch, you go "about 8:10." We're not using the atomic clock.

Q. Now, you said that you didn't have any animosity toward Mr. Alford. So what was the purpose of this comment, "I haven't started to chew your ass yet"?

A. He said that I was chewing his ass, and it – if I had been chewing his ass, there would have been no question about it.

Q. Sort of like when he was under arrest, there was no question that he was under arrest?

A. Right.

Q. Because he was under arrest as soon as he got out of that car, wasn't he?

A. As I indicated, I think I placed him under arrest while he was still in the car. My first statement was, "You're under arrest," if I remember, "for illegal recording," and I think I said, "Do [sic] understand?"

Q. Now, you were standing on the passenger side. You say you

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were standing on the passenger side and you looked in and you saw the tape recorder, and you saw the play and record buttons were pushed, correct?

A. After the jacket had been removed off the recorder where it was secreted.

Q. Okay. So when you were looking and you saw something dark and shiny, you thought it was a gun or a weapon, that's not when you saw the play and record buttons pushed down?

A. My attention was immediately directed to this black, shiny item that was underneath the coat, partially dislodged now, and then I recognized what it was.

Q. So it didn't take you long at all to figure out it was not a weapon.

A. It – my senses were heightened to an extreme level when I saw the black, shiny thing, and I directed my attention on it while still keeping him in my peripheral vision, looking down, and then saw what it was.

Q. Mmm. Did you ever ask him if he had accidently [sic] pushed those buttons?

A. No, I did not.

Q. You had absolutely no problem being recorded during that traffic stop?

A. Not if the recorder is in the open, none at all.

Q. You dealt with law enforcement recordings while you were in the narcotics division, correct?

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A. I never made any, no.

Q. Were you aware of how they were done?

A. Yes.

Q. And there was a procedure to get – is there a procedure to get court approval before you make one of those recordings?

A. At that time it was different than it is today. Today it requires supervisory approval of a certain level of supervisor, and it has to be written down, recorded, and maintained for so long, and it's only good for so long. I don't remember exactly what it is. But it's different now than what it was then. In those days you had to get a court order. I don't want to say the old days.

Q. It's okay. You put in 20 years, you're entitled. Now, what are the WSP regulations on when you are supposed to affect an arrest, or when you are authorized to affect an arrest?

A. When you have probable cause.

Q. And probable cause is defined as?

A. Facts and circumstances that would lead a reasonable and prudent person to believe that a crime has been or is being committed or actually is about to be committed.

Q. Have you ever claimed in this case that you consulted with the attorney prior to arresting Mr. Alford?

A. You know, I think there, on this deal here, it's a little bit of a – I suppose a technical misstatement, because it says

* * *

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other person around was Trooper Haner. There was nobody else around. Nobody that could hear us if we were screaming, and that it was a private conversation.

Q. You made the decision?

A. I did, yes. When I observed the tape recorder.

Q. And you stand by that?

A. Yes, I absolutely do.

MR. PHILLIPS: I have nothing else for you.

MR. MENTZER: I have no questions, Your Honor.

THE COURT: Detective, you may step down.

(Witness excused.)

THE COURT: Ladies and gentlemen, I understand our next witness we have scheduled for 1:30, so I'm going to ask you to come back at 1:30. That will give you a long lunch. I'm trying very hard to get jury instructions ready for you, and we won't waste that time because that has to be done before we can submit the case to you anyway. We're still trying to finish this today, although it is doubtful that we will be able to do that, but we are going to keep trying.

So take a long lunch, follow my instructions about recesses, and go your own way and do what you want to do, but come back ready to go to work at 1:30. I will know more then about how we are going to proceed. I try not to keep you around here waiting if I – you know, if it's going to be a waste of your time. So, go shopping.

* * *

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Q. Okay. Do you remember whether you received a call from Sergeant Devenpeck on November 22nd, 1997?

A. I did, yes.

Q. That call involved Mr. Alford?

A. Correct.

Q. Okay. What information did Sergeant Devenpeck relate to you during that telephone conversation?

A. It was my understanding that – it happened in the evening. I was home. What I recall is they had a suspect, I believe – it was Trooper Haner and Sergeant Devenpeck; there may have been

another trooper – but as I recall, there was a suspect who had pulled in behind a disabled vehicle and had done so with flashing wig-wag lights in a way that could be interpreted he was impersonating a police car. It's also, if I recall correctly, there may have been some question in the mind of the motorists in the disabled vehicle as to whether or not an officer had just pulled up behind him. Apparently then a real trooper came pulling in sometime after the suspect, Mr. Alford, and as I understand it, the motorist asked some questions about whether or not the first person who pulled in behind him was an officer.

He advised me that the trooper, I believe it was Trooper Haner, after learning this from the motorist, the disabled motorist, that he had gone off and – excuse my voice, I've been at the dentist so my voice is a little dry.

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It was my understanding – excuse me – that Trooper Haner then went and stopped the car that had pulled in behind the disabled vehicle, the car that allegedly had these wig-wag lights. And when he pulled over that person, he found handcuffs in the car, a police scanner in the car, and that that individual, the suspect, Mr. Alford, was either evasive or lying about the wig-wag lights. Apparently Trooper Haner had great difficulty getting the suspect to admit that he had wig-wag lights, and then, as I recall, it was something to the effect the suspect, once it was determined that, yes, in fact there were wig-wag

lights, as I recall, the suspect said he didn't know how to use them, or something to that effect.

Those were the facts as I recall, and again I don't recall which encounters were specifically between Trooper Haner and the suspect and Sergeant Devenpeck and the suspect. I just remember the big picture and those facts.

And the other fact I remember being told is that when Sergeant Devenpeck was talking to the suspect, he looked over and saw a tape recorder somewhat hidden, and the suspect had furtively, without his consent, knowledge, or permission, recording him.

Q. Did you discuss any of the applicable laws with Sergeant Devenpeck at that point?

A. Yes, we did.

Q. What laws did you discuss?

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A. The main discussion centered around the Privacy Act, and that is Washington State's Privacy Act regarding recording of another person. I believe we also discussed possible impersonation of an officer charge here and possible false representation to an officer.

Q. What was your impression of the timing of this call in relation to the arrest?

A. You know, I'm not exactly sure. I know it was at home and it was in the evening. I do not know the exact times. I understand there may be phone records, but I have not reviewed the phone records.

You mean the time in relation to what was going on between the suspect and the troopers?

Q. Exactly, yes.

A. It was my understanding that this call was coming to me from the scene.

Q. And you were at home, weren't you?

A. Yes.

Q. Did you have a copy of the Privacy Act at home?

A. No, I don't have – I'm not online with cases at home. However, most of the issues I deal with in DUI, I deal with so much that I usually know the applicable law. For example, I have many times dealt with false representations to an officer. That comes up a lot and I was up to speed on that case law. It's not unusual for suspects to give false information to

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officers.

The other issue that was potentially there was criminal impersonation, that is someone impersonating a police officer. I had dealt with that issue a lot less, but I had seen it before.

The other issue, which is the violation of the Privacy Act, that is the one and only time that I've dealt with that issue, violation of the Privacy Act. But as I recall, Sergeant Devenpeck – and I expressed to Devenpeck that I didn't know the law that well in that area, and he read me the statute over the phone, is my recollection.

Q. And what were you attempting to do at this point?

A. What you're always attempting to do in a situation like that, you look at the big picture, all of the facts that are available to you, and take into account the law and decide if there's probable cause. Much later in the process, I'll make a determination of whether or not to charge and whether or not it's something I can prove in court beyond a reasonable doubt. The standard – probable cause is a much, much lower standard than proof beyond a reasonable double [sic]. Probable cause is just a reasonable suspicion that a crime has been committed.

So that's what I'm looking for at this point, but I'm also starting to think forward to how will I deal with this later, what will I charge later? As I expressed before, you, as a prosecutor, will often end up charging something different than

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what the officers arrested the individual for.

So I'm looking at the facts, all of the facts, looking for possible charges, and looking for probable cause.

Q. Did you make a determination of probable cause here?

A. Yes, I did.

Q. What was that determination?

A. I advised Sergeant Devenpeck there was clearly probable cause.

Q. Okay. And what was that determination based on exactly?

A. All the things that I just listed, the big pictures. All the facts. I considered the fact that he had wig-wag lights. I considered the fact that he pulled in behind a disabled motorist using those wig-wag lights in a way that the motorist might have interpreted him to be a police officer. I looked at the fact there were handcuffs and a police scanner in the vehicle. I also put a lot of weight on the fact that the defendant was evasive and not honest about those wig-wag lights, and I looked at the fact that that tape recorder was hidden.

Q. Were you familiar at that time with a case called Florez, State of Washington v. Florez?

A. On that evening, no, I was not.

Q. Were you familiar with any cases involving the Privacy Act at that point?

A. No, I had not dealt with that issue before.

Q. Did Sergeant Devenpeck mention the case of State v. Florez.

* * *

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MR. PHILLIPS: Not from plaintiff, Your Honor.

MR. MENTZER: I have one.

THE COURT: Yes.

MR. MENTZER: the same one I made in chambers. I haven't yet numbered them. I will try to figure out which one it is.

14, if that is the one, Your Honor. It says, "It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not private under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of State of Washington v. Flora."

We take exception to that instruction with all due respect to the court. We know that was the ruling on our motion for summary judgment, but we believe the Washington Supreme Court in State v. Clark, 129 Wn.2d 211, is dispositive and determinative of that factor. And the critical factor, we believe, is that there were passersby present, and that is what made the difference in Flora. In this case there were no passersby, and thus we believe that the State v. Clark stands for the proposition that the conversation was private and thus not lawful to record under the Privacy Act.

THE COURT: I appreciate your argument. It is my judgment, as I guess I'm not sure I have said on the record, but

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it's my judgment that the language of the Privacy Act itself requires that a conversation be private before there is a prohibition on one-party-consent recording. It seems to me ultimately clear and

plain on the face of the statute, and also in the law that has interpreted it, that when a police officer is making a stop on a public highway that that is not a private conversation. Among other reasons is that everything that is said there is a matter of public interest and public inquiry, including in-court inquiry. There's nothing that can be said, in my view, by either – and this goes beyond this case, but I think there's nothing said under such circumstances by the one stopped or by the police officers that they can reasonably expect will be held private. It's a public officer doing public business with a citizen who is a member of the public, and the citizen should know from the circumstances, as the officers should know from the circumstances, that the conversations would not be expected to be private. Certainly they would claim it wasn't private if there's a confession on the spot.

So, in any event, that's my view of that issue.

Okay. Are we ready to instruct the jury then?

MR. PHILLIPS: Yes, Your Honor.

MR. MENTZER: Yes, Your Honor.

THE COURT: All right.

(Jury present.)

THE COURT: Ladies and gentlemen, you heard before the

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last long recess here that both parties have rested, meaning they have presented all the

evidence that they choose to present in the case, and so it is now time to instruct you on the law.

I told you earlier that you would be allowed to take notes during the presentation of evidence, but not at any other time. So now is the time for you to put your notes away. The only time you have taken notes is when there has been evidence presented to you, and I will ask you to not take further notes. You will be allowed to take those notebooks into the jury room with you.

I do want to just take a second to explain this process.

Jean is going to hand you copies of the instructions and verdict forms. I am going to read the instructions to you. You can read along with me, if you wish, or just listen. Some people have better comprehension if they read along with a speaker; others find it better to just listen. Either way, it's up to you.

Those copies of the instructions are work copies for you and you can taken those into the jury room with you. The original instructions that I read from and that bear my original signature are the instructions that will control your deliberations. If there are any differences between the original instructions and your copies, it's the original ones that control.

Now, I have already, in order to save time in typing, have

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made some interlineations in these instructions. I've just stricken some words out and initialed in

the margin. The only reason for that is to save time. Any parts that I have stricken out are not part of the instructions. You are to disregard that.

Also you should be aware that sometimes when I read instructions I find typographical errors that I overlooked before or something is wrong. If I do make any changes here in court that are not in your copies, I will let you know what they are as we go along.

But with that introduction, I will instruct you on the law.

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took and oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally

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important. You must not read into these instructions or into anything the court may have

said or done any suggestion as to what verdict you should return – that is a matter entirely up to you.

The evidence from which you are to decide what the facts are consist of: The sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness; and the exhibits which have been received into evidence.

Evidence may be direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which the witness has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, and interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and

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weight.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing argument, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you

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find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

The plaintiff has two claims: One is a federal claim for violation of civil rights, and the second is a state claim for unlawful arrest and imprisonment.

You should decide the case of each defendant separately as if it were a separate lawsuit. Unless a specific instruction states that it applies to a specific defendant, the instructions apply to each defendant.

On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. The acts or omissions of the defendant in arresting plaintiff were intentional;

2. The defendant acted under color of law; and

3. The acts or omissions of the defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.

On plaintiff's state claim, the plaintiff has the burden of

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proving each of the following by a preponderance of the evidence:

1. That the defendant detained plaintiff for an unreasonable time for investigation and/or arrested the plaintiff without probable cause;

2. That the defendant acted under color of law;

3. That the defendants' acts were a proximate cause of damages sustained by the plaintiff.

Each defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff was lawful and acted on that belief;

2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful.

If the plaintiff has failed to prove each of the things on which plaintiff has the burden of proof on a claim, your verdict should be for the defendant on that claim.

If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the

burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

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Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. The court has found that the defendant acted under color of law.

An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime.

In pertinent part, the Washington State Privacy Act, RCW 9.73.030, provides: " . . . It shall be unlawful for any individual . . . to record any . . . private conversation, by any device . . .without first obtaining the consent of all the persons engaged in the conversation.

And further, section 3, Where consent of all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such

communication or conversation is about to be recorded or transmitted; provided, that if the conversation is to be recorded that said announcement shall also be recorded.

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Violation of the Privacy Act is a gross misdemeanor.

It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not "private" under the Privacy Act. This rule of law was clearly established by Washington courts in 1992 in the case of State of Washington v. Flora.

A felony is a crime punishable by over one year in prison. A gross misdemeanor is a crime punishable by up to one year in jail.

A traffic infraction is punishable only by fine.

A police officer may detain a suspect for a limited period of time for investigation only if the officer has a reasonable suspicion, based on specific and articulable facts, that the person is engaged in criminal activity, or has committed a traffic infraction.

In determining whether the length of a detention of plaintiff before his arrest was reasonable, you should consider the nature of the criminal activity suspected, and whether the detention lasted no longer than necessary to confirm or deny that suspicion.

It is the duty of the court to instruct you on the measure of damages. By instructing – and I see a typographical error there I'm going to interline. The word "instruction" in the instruction on line 3 should be "instructing." Let me start

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again.

It is the duty of the court to instruct you on the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff on plaintiff's claim, you must determine plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

The nature and extent of the injuries.

The disability experienced.

The mental, physical, and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

The reasonable value of earnings, earning capacity, and employment opportunities lost to the present time.

The plaintiff has the burden of proving damages by a preponderance of the evidence, and

it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

If you find that before this occurrence the plaintiff had a preexisting condition which made him more subject to injury than

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a person in normal health, and if you find that the condition was aggravated or made active because of the occurrence, you should consider all injuries or damages proximately caused by the occurrence even though those injuries may have been greater than those which would have been suffered by a person in normal health under the same circumstances. There may be no recovery, however, for any results which would have normally followed from the preexisting condition had there been no occurrence as complained of in this case.

Only if you find for the plaintiff on plaintiff's federal claim, but you find that the plaintiff has failed to prove actual damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply

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because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do no change an honest belief about the weight and effect of the evidence simply to reach a verdict.

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form or forms and advise the court that you have reached a verdict.

Now attached you will see work copies of the verdict forms. You will only use one verdict form in this case. Use verdict form A if you find for the plaintiff and against either or both defendants on either or both of plaintiff's claims. And if you use verdict form A, you will fill in that "We, the jury, find for the plaintiff and against defendants," and write in the name of any defendant that you find against, "and find plaintiff's damages to be," and there you would write in a number as indicated.

If you find for defendants and against plaintiff, you will use verdict form B only, and it simply

reads, "We, the jury, find for both defendants and against plaintiff."

Now, let me say a couple of other things before we turn to argument.

There's a buzzer in the jury room that buzzes into chambers, so that after you start to deliberate on the case you should not

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Instruction No. 1

Members of the jury, now that you have heard all the evidence ~~and the arguments of the attorneys~~[RJB], it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return–that is a matter entirely up to you.

Instruction No. 2

The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness; *and* [handwritten]
2. the exhibits which have been received into evidence; ~~and~~
3. ~~any facts to which all the lawyers have agreed or stipulated~~. RJB

Instruction No. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which the witness has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other

Instruction No. 4

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the

witness' memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

Instruction No. 5

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

2.[sic] Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence

and must not be considered. ~~[In addition some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.]~~ RJB

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Instruction No. 6

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

Instruction No. 7

The term "proximate cause" means a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

Instruction No. 8

Plaintiff has two claims: one is a federal claim for violation of civil rights, and the second is a state claim for unlawful arrest and imprisonment.

Instruction No. 9

You should decide the case of each defendant separately as if it were a separate lawsuit. Unless a specific instruction states that it applies to a specific defendant, the instructions apply to each defendant.

Instruction No. 10

On plaintiff's federal claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. The acts or omissions of the defendant in arresting plaintiff were intentional;
2. The defendant acted under color of law; and
3. The acts or omissions of the defendant were the proximate cause of the deprivation of the plaintiff's constitutional right to be free from unreasonable arrest.

On plaintiff's state claim, the plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant detained plaintiff for an unreasonable time for

investigation and/or arrested the plaintiff without probable cause;

2. That the defendant acted under color of law;

3. That the defendant's acts were a proximate cause of damages sustained by the plaintiff.

Each defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the defendant reasonably and in good faith believed that the detention and/or arrest of plaintiff were lawful, and acted on that belief;

2. That a reasonable officer acting under the same circumstances at the same time would have believed that the detention and/or arrest were lawful.

If the plaintiff has failed to prove each of the things on which plaintiff has the burden of proof on a claim, your verdict should be for the defendant on that claim.

If you find that each of the things on which plaintiff has the burden of proof on a claim has been proved, your verdict should be for the plaintiff on that claim, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which event your verdict should be for the defendant on that claim.

Instruction No. 11

Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. The court has found that the defendant acted under color of law.

Instruction No. 12

An arrest made without probable cause is unreasonable. Probable cause to arrest is determined by viewing the totality of the circumstances known to the arresting officer at the time of the arrest. The standard is met if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime.

Instruction No. 13

In pertinent part, the Washington State Privacy Act, RCW 9.73.030, provides:

> . . . it shall be unlawful for any individual . . . to record any . . . private conversation, by any devise . . . without first obtaining the consent of all the persons engaged in the conversation.
>
> * * *
>
> (3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in

the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: *Provided,* That if the conversation is to be recorded that said announcement shall also be recorded.

Violation of the privacy Act is a gross misdemeanor.

Instruction No. 14

It is not a violation of the Washington Privacy Act to tape-record a police officer in the performance of an official function on a public thoroughfare. Such conversations are not "private" under the Privacy Act. This rule of law was clearly established by Washington courts on 1992 in the case of *State of Washington v. Flora.*

Instruction No. 15

A felony is a crime punishable by over one year in prison. A gross misdemeanor is a crime punishable by up to one year in jail.

A traffic infraction is punishable only by fine.

Instruction No. 16

A police officer may detain a suspect for a limited period of time for investigation only if the officer has a reasonable suspicion, based on specific and articuable facts, that the person is engaged in criminal activity, or has committed a traffic infraction.

In determining whether the length of a detention of plaintiff before his arrest was reasonable, you should consider the nature of the criminal activity suspected, and whether the detention lasted no longer than necessary to confirm or deny that suspicion.

Instruction No. 17

It is the duty of the court to instruct you on the measure of damages. By ~~instruction~~ *instructing* [handwritten] you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff on plaintiff's claim, you must determine plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

The nature and extent of the injuries.

The disability experienced.

The mental, physical, and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

The reasonable value of necessary medical care, treatment, and services received to the present time.

The reasonable value of earnings, earning capacity, and employment opportunities lost to the present time.

The plaintiff has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Instruction No. 18

If you find that before this occurrence the plaintiff had a pre-existing condition which made him more subject to injury than a person in normal health, and if you find that the condition was aggravated or made active because of the occurrence, you should consider all injuries or damages proximately caused by the occurrence even though those injuries may have been greater than those which would have been suffered by a person in normal health under the same circumstances. There may be no recovery, however, for any results which would have normally followed from the pre-existing condition had there been no occurrence as complained of in this case.

Instruction No. 19

Only if you find for the plaintiff on plaintiff's federal claim, but you find that the plaintiff has failed to prove actual damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

Instruction No. 20

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Instruction No. 21

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form or forms and advise the court that you have reached a verdict.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD, Plaintiff, v. JOI HANER, and JANE DOE HANER, his wife; and GERALD DEVENPECK, and JANE DOE DEVENPECK, his wife, Defendants.	Case No. C99-5586RJB VERDICT FORM A

WE, the jury, find for plaintiff and against defendant(s) _____.
(Write in "Haner" and/or "Devenpeck")

and find plaintiff's damages to be $_____.

DATED this ____ day of January, 2001

_____
FOREPERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEROME ANTHONY ALFORD, Plaintiff, v. JOI HANER, and JANE DOE HANER, his wife; and GERALD DEVENPECK, and JANE DOE DEVENPECK, his wife, Defendants.	Case No. C99-5586RJB VERDICT FORM B

WE, the jury, find for both defendants and against plaintiff.

DATED this 5th day of January, 2001

/s/ George W. Heck
FOREPERSON